

1-2008

Wrongful Convictions as Rightful Takings: Protecting "Liberty-Property"

John Martinez

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

John Martinez, *Wrongful Convictions as Rightful Takings: Protecting "Liberty-Property"*, 59 HASTINGS L.J. 515 (2008).
Available at: https://repository.uchastings.edu/hastings_law_journal/vol59/iss3/2

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Wrongful Convictions as Rightful Takings: Protecting “Liberty-Property”

JOHN MARTINEZ*

When . . . by a misguided or mistaken operation of the governmental machine there is a miscarriage of justice and the helpless innocent is actually convicted, the public conscience is and ought to be revolted and dismayed. The least the community can do to repair the irreparable, is to appease the public conscience by making such restitution as it can by indemnity.¹

When a small piece of property is taken by the government to build a new highway, the owner is constitutionally guaranteed fair market compensation, even if owed a relatively trivial sum. But when an innocent person is wrongly convicted by the criminal justice system, he or she is not guaranteed a dime when the mistake is discovered afterward, despite the scars of long years of incarceration.²

INTRODUCTION

DNA evidence is now widely used to secure exonerations of people imprisoned for crimes they did not commit. Exonerees, however, typically recover nothing for the harm caused by their wrongful conviction and incarceration. Instead, they are set free to be poor: their common law claims are defeated by sovereign immunity doctrine, statutes providing for relief typically erect a network of obstacles to recovery that most litigants find virtually impenetrable, and their constitutional civil rights claims shatter against the barriers of governmental immunity and causation doctrines.

Potential alternative grounds for recovery arise from just compensation clauses in federal and state constitutions.³ Such clauses

* Professor of Law, S.J. Quinney College of Law at the University of Utah. This Article was funded in part by the University of Utah College of Law Excellence in Teaching and Research Fund. I am particularly grateful to my wife Karen Martinez for her insightful comments and suggestions on this Article. I would also like to thank Ms. Jennifer Butler, Class of 2006, for her editorial help.

1. EDWIN M. BORCHARD, CONVICTING THE INNOCENT-ERRORS OF CRIMINAL JUSTICE 392 (1932).

2. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1063 (2004).

3. The Federal Just Compensation Clause provides that “private property [shall not] be taken for public use, without just compensation.” U.S. CONST. amend. V. Similar just compensation provisions in state constitutions, prohibit the “taking” of “property” without payment of “just compensation.” See, e.g., CAL. CONST. art. I, § 19 (“Private property may be taken or damaged for

require the claimant to show “property” was “taken” by the government and that therefore “compensation” is constitutionally compelled.⁴

The fundamental flaw of just compensation clause arguments as a form of relief for wrongful convictions to date, however, has been that they are based on a conception of “property” that focuses on the asset involved as the property in question. Such “thing-thinking” about property in the context of wrongful conviction relief treats the person wrongfully convicted as the “asset” involved. This immediately raises the moral conundrum of treating people as commodities—as slaves that have been “taken” by the government. More fundamentally, however, such “thing-thinking” about property leads to the analytical dead end of focusing on the asset involved, rather than on the rights of the people affected.

This Article suggests that we should instead think of wrongful convictions as arising at the boundary of liberty and property. Wrongful convictions resulting in incarceration destroy numerous quintessentially “liberty” interests, including the right to move about freely, to privacy, to free speech, to security of person, and to the freedom to engage in personal and professional achievement. A wrongful conviction often destroys these liberty interests, and this destruction, in turn, causes devastating economic consequences for those wrongfully convicted.

This Article suggests that destruction of liberty interests by wrongful convictions causes a taking of “liberty-property” for which a remedy is constitutionally compelled by state and federal just compensation clauses. In order to use just compensation clause arguments effectively to provide compensation for the wrongfully convicted, we must utilize a conceptualization of property that focuses on rights, not on the asset in question. Such a relational concept of property makes possible a consideration of what is *really* at stake in wrongful conviction settings: rights, *not* assets. Compensation, therefore, may be re-envisioned as the value of the rights of which those wrongfully convicted have been deprived.

public use only when just compensation”); UTAH CONST. art. I, § 22 (“Private property shall not be taken or damaged for public use without just compensation.”).

4. The Author’s work in the field of takings includes: JOHN MARTINEZ, GOVERNMENT TAKINGS (2006) [hereinafter MARTINEZ, GOVERNMENT TAKINGS]; John Martinez, *A Prudential Theory for Providing a Forum for Federal Takings Claims*, 36 REAL PROP. PROBS. & TR. J. 445 (2001); John Martinez, *Reconstructing the Takings Doctrine by Redefining Property and Sovereignty*, 16 FORDHAM URB. L.J. 157 (1988); John Martinez, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 URB. LAW. 327 (1994); John Martinez, *Taking Time Seriously: The Federal Constitutional Right to Be Free From “Startling” State Court Overrulings*, 11 HARV. J.L. & PUB. POL’Y 297 (1988); see also 3 C. DALLAS SANDS, MICHAEL E. LIBONATI & JOHN MARTINEZ, LOCAL GOVERNMENT LAW ch. 16, at 1 (1987) [hereinafter 3 SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW]; JOHN MARTINEZ & MICHAEL E. LIBONATI, STATE AND LOCAL GOVERNMENT LAW: A TRANSACTIONAL APPROACH (2000) [hereinafter MARTINEZ & LIBONATI, STATE AND LOCAL GOVERNMENT LAW].

This Article proceeds as follows: Part I critically analyzes the nature of wrongful convictions and their incidence in the United States. That analysis reveals that DNA exonerations, by simultaneously overturning a conviction as well as establishing factual innocence, are only the most obvious examples of wrongful convictions. There are numerous additional categories of wrongful convictions, including cases of errors in criminal procedure, circumstances of factual innocence, and situations where factual innocence or guilt is indeed unresolved. Part II uses the civil case of Michael Ray Graham and Albert Burrell, who were wrongfully convicted and spent thirteen years on death row, to illustrate the failure of current legal doctrine to provide compensation for wrongful convictions in the United States. Part III critically examines existing normative justifications for providing compensation to the wrongfully convicted and suggests that the loss-spreading dimension of just compensation jurisprudence provides a better normative foundation than existing formulations. Part IV then focuses on existing just compensation clause doctrinal arguments for providing compensation to the wrongfully convicted and points out their flawed “thing-thinking” conception of property. Part V explains that wrongful convictions arise at the boundary between liberty and property, and describes how a “relational” property construct liberates otherwise flawed doctrinal constructs to properly focus on rights, rather than assets, in the wrongful conviction setting. Part VI concludes by illustrating how the relational property construct allows us to establish the crucial link between liberty protection and property protection. This, in turn, allows us to implement the loss-spreading norm via a reconstructed just compensation jurisprudence. The elements of wrongful conviction claims, as well as the remedial considerations that should be taken into account in their implementation, are also examined. Such reconstructed just compensation jurisprudence ultimately allows us to properly protect the “liberty-property” of the wrongfully convicted through the provision of compensation for liberty deprivations.

I. WRONGFUL CONVICTIONS AND THEIR INCIDENCE IN THE UNITED STATES

A. DEFINING “WRONGFUL CONVICTIONS”

The term “wrongful conviction” has two components: (1) “wrongful” refers to the governmental conduct that caused the “conviction” result and (2) “conviction” refers to the impact on the person subjected to the governmental conduct in question. Each of these terms must be separately defined.

The term “wrongful” has two possible subsets. Substantive

wrongfulness refers to someone who is factually innocent⁵ of the offense for which they were convicted. Procedural wrongfulness refers to someone who was convicted through tainted procedures, such as denial of Miranda warnings or prosecutorial concealment of exculpatory evidence from the defense. Substantive wrongfulness arises when the government convicts a person who is factually innocent of the crime involved.⁶ “Innocence Projects” throughout the United States are focused on helping factually innocent people—those who “didn’t do it”—as opposed to those who might have been convicted through a procedural irregularity.⁷

Substantively wrongful convictions are almost universally recognized as proper bases for wrongful conviction compensation claims.⁸ Federal and state wrongful conviction statutes are founded on the notion that the claimant who can demonstrate that he or she truly “didn’t do it” is entitled to compensation. Indeed, almost all of these statutes provide for recovery *only* by those who can prove they are factually innocent.

Procedural wrongfulness arises when the government engages in procedural irregularity resulting in a criminal conviction. Such procedural irregularities are many and varied. They may arise at the initial stages of police conduct, such as a police officer’s failure to provide a *Miranda* warning, police perjury, or the failure to disclose investigation information to which a defendant is entitled.⁹ Other examples of procedural wrongfulness include the use by prosecutors of unreliable witness testimony,¹⁰ false confessions, forensic fraud or

5. The term “factual innocence” is derived from William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 385 (1995) (“The search for a genuine consideration of factual innocence in the criminal process ends with state and federal statutes that are devised to compensate the wrongfully convicted and imprisoned.”).

6. See, e.g., Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1124–25 (2005) (“those who did not in fact commit the crime [of which they were convicted]”). See generally The Innocence Project—About Us, <http://www.innocenceproject.org/Content/9.php> (last visited Jan. 1, 2008) (“dedicated to exonerating the innocent”).

7. See C. Ronald Huff, *What Can We Learn from Other Nations About the Problem of Wrongful Conviction?*, 86 JUDICATURE 91, 92 (2002) (“actually innocent”); Center on Wrongful Convictions, <http://www.law.northwestern.edu/wrongfulconvictions/> (last visited Jan. 1, 2008) (focusing on “claims of actual innocence”).

8. A summary of existing statutes and their requirements are set out in the Appendix.

9. See, e.g., Leipold, *supra* note 6.

10. For example, a federal district court found that the FBI had knowingly used false snitch testimony to convict innocent defendants, and had continued to conceal the information while the defendants spent over thirty years in prison, some on death row. *Limone v. United States*, 497 F. Supp. 2d 143, 151 (D. Mass. 2007) (“[G]overnment agents suborned perjury, framed four innocent men, [and] conspired to keep them in jail for three decades . . .”). Since intentional governmental conduct was involved, the *Limone* case was brought as a tort claim under the Federal Tort Claims Act, not under a takings theory. *Id.* at 202 (“Plaintiffs bring six claims against the United States under the Federal Tort Claims Act (‘FTCA’), 28 U.S.C. §§ 1346 and 2671–2680: malicious prosecution, civil conspiracy, intentional infliction of emotional distress, bystander intentional infliction of emotional distress, negligent selection, supervision, and retention, and loss of consortium.”). Since 1974, the

quackery, or other prosecutorial misconduct.¹¹

Procedural wrongfulness also may arise even when no police or prosecutorial misconduct or neglect has occurred. Examples include erroneous eyewitness identification testimony, ineffective assistance of counsel, and newly discovered evidence which simply was unavailable to anyone before a conviction became final.¹²

For example, Harry Miller was convicted of stealing a woman's purse at knifepoint in Salt Lake City and spent four and one-half years of a five-years-to-life sentence in a Utah prison.¹³ Subsequently identified witnesses and hospital records, however, showed that during the time period when the offense was committed, Mr. Miller was being treated in Louisiana for a paralyzing stroke he had suffered.¹⁴ The Utah Court of Appeals overturned his conviction and granted him a new trial.¹⁵ The Utah prosecutors decided not to retry him and he was set free, but penniless.¹⁶ There was no police or prosecutorial misconduct or neglect in Mr. Miller's case. The prosecutors had sufficient evidence to take the case to trial, a jury convicted him, and he was sent to prison. Mr. Miller also received adequate representation—defense counsel, appointed by the State, believed sufficient available evidence existed to establish reasonable doubt.¹⁷ The fact remains, however, that Mr. Miller suffered

federal government has allowed itself to be sued for certain intentional torts committed by federal "investigative or law enforcement officers." 28 U.S.C. § 2680(h) (2000). The statute was amended in 1974 to allow suits for assault, battery, false imprisonment, false arrest, abuse of process and malicious prosecution. Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat 50; *see also* Limone v. United States, 336 F. Supp. 2d 18, 29-30 (D. Mass. 2004) (reviewing the history of this 1974 amendment to the Federal Tort Claims Act). For a discussion of the distinctions between tort claims and constitutional claims against the federal government, *see* JOHN MARTINEZ, GOVERNMENT TAKINGS, *supra* note 5, § 4:4.

11. *See* Rob Warden, *Illinois Death Penalty Reform: How It Happened, What It Promises*, 95 J. CRIM. L. & CRIMINOLOGY 381, 382-83 (2005) (causes of convictions in capital exonerations in Illinois); *see also* Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333, 340 (2002).

The . . . errors . . . that produce wrongful convictions . . . derive not just from what happens in the courtroom, but from every step in the process—from the initial gathering of evidence, interviewing of witnesses, and identification of suspects; to the decisions about whom to investigate, what science and experts to utilize, what evidence the state must or should disclose to the defense; to the rules governing admissibility of evidence, such as expert testimony on eyewitness identification and the testimony of jailhouse informants; to the instructions given to the jury on these matters; to the nature of and applicable standards for appellate review and the availability of postconviction remedies.

Id.

12. Such instances of procedural wrongfulness are sometimes described as "miscarriages of justice." Michael Naughton, *Redefining Miscarriages of Justice, a Revived Human-Rights Approach to Unearth Subjugated Discourses of Wrongful Criminal Conviction*, 45 BRIT. J. OF CRIMINOLOGY 165, 166-67 (2005) (discussing wrongful convictions as "miscarriages of justice," defined as any case subsequently overturned on appeal, in England and Wales).

13. Stephen Hunt, *Wrongful Prosecution?*, SALT LAKE TRIB., July 22, 2007, at A1, A11.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at A11.

harm under circumstances in which his guilt or innocence was never properly adjudicated.

The question thus becomes whether the State's *procedures* are responsible for Mr. Miller's harm. The State appointed his counsel;¹⁸ thus, if the State failed to assure such counsel was properly qualified and had adequate financial support to mount a defense, then Mr. Miller could argue that his harm was "caused" by the State's wrongful procedure.¹⁹ On the other hand, if he had hired his own counsel, any conduct by such counsel could not be attributed to the State's procedures for appointing counsel for indigent defendants. In Mr. Miller's case, the State appointed his counsel, and it appears that Mr. Miller was adequately represented. Therefore, we must conclude that the State's *procedures* were not responsible for Mr. Miller's harm.

Mr. Miller still might be entitled to relief, however, even though the State's procedures did not cause his harm. This requires consideration of the relation among procedures, convictions, and factual innocence or guilt.

1. *Procedures, Convictions, and Factual Innocence or Guilt*

Our criminal justice system does not seek truth; it seeks justice.²⁰ Justice is driven by considerations such as problem-solving, predictability and finality.²¹ To state the obvious, it is possible for a criminal defendant to be found guilty beyond a reasonable doubt and convicted while failing to determine whether the defendant is indeed factually innocent or factually guilty. It is therefore useful to consider the relationship among (1) wrongful or non-wrongful procedures, (2) conviction beyond a reasonable doubt, and (3) factual innocence or guilt.

Wrongful procedures²² may result in convictions of the factually innocent or of the factually guilty. Even non-wrongful procedures may result in convictions either of the factually innocent or the factually

18. See *id.* at A1.

19. Cf. *N.Y. County Lawyers' Ass'n v. State*, 745 N.Y.S.2d 376, 387 (N.Y. Sup. Ct. 2002) (increase in appointed attorney compensation ordered because inadequate rates create "an economic disincentive for lawyers to perform adequate investigations and seek speedy disposition of all cases despite the particular facts").

20. Cf. Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 30 (1996) ("I wonder what would result if we redefined our legal system to seek 'problem-solving' as one of its goals rather than 'truth-finding.'").

21. *Id.*; see also *Ward v. Turner*, 366 P.2d 72, 74 (Utah 1961) ("In order to justify a [post-conviction] release of a convicted person . . . the evidence of his innocence must be stronger than would be necessary in the first instance in support of a motion for a new trial, for such special writs are applied for after the defendant's conviction has been affirmed or denied on appeal, and in a sense they invade the usual rules for the finality of judgments."); Stephen J. Safranek, *The Legal Obligation of Clients, Lawyers, and Judges to Tell the Truth*, 34 IDAHO L. REV. 345, 345-46 n.2 (1998).

22. As discussed in the immediately preceding section, "wrongful procedures" may arise *either* where there is police or prosecutor misconduct or neglect, *or* when the State fails to appoint properly qualified and adequately supported defense counsel.

guilty. The latter situations arise where there is no police or prosecutorial neglect or misconduct, and the State otherwise provides proper procedures such as duly qualified and adequately supported appointed counsel. For example, in Mr. Miller's case, since there was no police or prosecutor misconduct or neglect, and if his State-appointed counsel was qualified and adequately supported, then Mr. Miller cannot establish that it was the State's wrongful procedures that caused his harm. Thus Mr. Miller has no remedy based on the State's wrongful procedures.

In order to bring those other possibilities for relief into focus, it is necessary to clarify the relation between wrongful procedures, conviction beyond a reasonable doubt, and factual innocence or guilt. First, the process of conviction beyond a reasonable doubt is simply the vehicle whereby the government conduct—whether from wrongful procedures or from non-wrongful procedures—results in the impact on the defendant of conviction and incarceration.²³ Second, although the criminal justice system has a certain inertia justified by the goal of preserving a criminal conviction as a final judgment, the fact that a defendant has been convicted does not determine whether the defendant is factually innocent or factually guilty. Thus, conviction is independent of both wrongful or non-wrongful procedures on one hand, and factual innocence or factual guilt on the other.

2. *Grounds for Wrongful Conviction Relief*

Criminal convictions may result from wrongful or from non-wrongful procedures, and such convictions may punish factually innocent or factually guilty persons. The matrix is as follows:

(1) Wrongful Procedures + Factual Innocence	(3) Wrongful Procedures + Factual Guilt
(2) Non-Wrongful Procedures + Factual Innocence	(4) Non-Wrongful Procedures + Factual Guilt

Convictions of the factually innocent, in settings (1) and (2), whether through wrongful or non-wrongful procedures, impose harm resulting

23. Alternatives to incarceration such as probation or community service also might be imposed which entail harm to defendants. Consideration of the impact of such alternatives, however, is beyond the scope of this Article. See generally *Developments in the Law—Alternatives to Incarceration*, 111 HARV. L. REV. 1863 (1998).

from the consequences of conviction. Circumstances of factual innocence, for example, arise when there is DNA evidence exonerating the defendant of the offense charged, or where a key witness recants testimony.²⁴ In setting (1), if the government can demonstrate that if proper procedures had been followed, the same (unfortunate) consequences would have resulted, it might be argued that the governmental conduct did not cause the harm involved and the claimant should not recover. Most jurisdictions that have considered whether to provide compensation to those who can prove they are factually innocent, however, have implicitly rejected such an argument.²⁵ The fact of factual innocence trumps the logic of causation, and substantive wrongfulness is often compensable in jurisdictions that provide for wrongful conviction compensation regardless of procedural wrongfulness. In contrast, convictions of factually guilty persons, whether through wrongful or through non-wrongful procedures, present different wrongful conviction remedial questions. In the wrongful procedure setting (3), suppose a search warrant is for "126 Main Street," but the police wrongfully search defendant's house on 129 Main Street instead. Suppose further that the police find a meth lab in the basement at 129 Main Street pursuant to the unlawful search. Assume the circumstances prove defendant is factually guilty and defendant is duly convicted. However, if the government can show that if the police had properly searched the defendant's house,²⁶ they would have found the meth lab, then the wrongful procedure did not "cause" the conviction and no wrongful conviction remedy would be available. The United States Supreme Court has established a similar principle with respect to § 1983 claims: "In order to recover compensatory damages . . . the § 1983 plaintiff must prove not only that the search was unlawful, but that it *caused* him actual, compensable injury"²⁷

The Court has emphasized the crucial causal link between deprivation of procedural rights and the harm suffered in the field of employment discrimination as well. Thus, an employee may not recover damages for the failure of an employer to provide a termination hearing where the employer can prove the employee would have been fired anyway if proper procedures had been used.²⁸

24. Cf. *Julian v. State*, 52 P.3d 1168, 1170 (Utah 2002) (noting, in a case where the issue was whether the defendant was entitled to a new trial, that the key witness recanted her trial testimony, admitting in 1994 that she had lied in the defendant's 1987 trial).

25. A summary of existing statutes and their requirements are set out in the Appendix.

26. For example, suppose the warrant was indeed for "129 Main Street."

27. *Heck v. Humphrey*, 512 U.S. 477, 487 n.7 (1994) (emphasis added).

28. *Carey v. Piphus*, 435 U.S. 247, 263 (1978) (holding that employee seeking damages for procedural due process violation must show injuries resulted from denial of due process itself, not from corresponding justifiable deprivation and allowing only one dollar nominal recovery); see also *Laje v. R. E. Thomason Gen. Hosp.*, 665 F.2d 724, 729-30 (5th Cir. 1982) (holding that if employer can

Convictions of the factually guilty through selective prosecution based on race or vindictive prosecution would be similarly analyzed under setting (3). Thus, such wrongful procedures would not have “caused” the convictions if the government can show such convictions would have occurred even if proper non-racial or non-vindictive prosecution had been used. Setting (4), by comparison, is relatively straightforward. Where the claimant indeed committed the offense charged and was convicted through non-wrongful procedures, no *bona fide* wrongful conviction claims can arise.

Further complexities arise when factual innocence or guilt is unresolved. Since conviction does not by itself establish factual innocence or guilt, and since wrongful as well as non-wrongful procedures might lead to convictions, the question becomes whether a remedy should be provided when innocence or guilt is unresolved. To take these additional settings into account, our matrix must include a third column:

(1) Wrongful Procedures + Factual Innocence	(3) Wrongful Procedures + Factual Guilt	(5) Wrongful Procedures + Guilt or Innocence Unresolved
(2) Non-Wrongful Procedures + Factual Innocence	(4) Non-Wrongful Procedures + Factual Guilt	(6) Non-Wrongful Procedures + Guilt or Innocence Unresolved

In setting (5), where procedural wrongfulness has caused the conviction but guilt or innocence is unresolved, it is arguable that compensation should be provided based on the wrongful procedures alone. Since it is presumed that criminal defendants are innocent until proven guilty, a procedural error leading to their conviction leaves the presumption unrebutted, even if factual innocence has not been demonstrated. For example, a 2003 Ohio statute provides that individuals released because they were incarcerated due to “an error in procedure,” as well as those who are judicially determined not to have committed a crime at all, are allowed to file a claim against the state.²⁹ And some European governments provide compensation for wrongful

prove proper procedures would have resulted in termination, employee may not recover).

29. OHIO REV. CODE ANN. § 2743.48(A)(5) (West Supp. 2004).

convictions that are due to wrongful procedures.³⁰

However, in setting (6), where *no* procedural wrongfulness caused the conviction—that is, when non-wrongful procedures resulted in a conviction—and guilt or innocence is unresolved, the problem becomes one of defining the standard of proof which the convicted person must meet in order to obtain wrongful conviction civil relief. Mr. Miller's case is illustrative: assuming no procedural wrongfulness caused his conviction and consequent harm, and since the prosecutors chose not to retry him, we must determine what standard of proof he would have to meet in order to recover in the subsequent civil wrongful conviction action. For example, a demanding standard would require that he prove factual innocence beyond a reasonable doubt. A less demanding standard would require he prove factual innocence by a preponderance of the evidence. An intermediate standard would require him to show that it was "substantially unlikely" he committed the offense.³¹ Definition of the appropriate standard of proof, including the myriad complexities of presumptions, and allocation and shifting of the burdens of production and persuasion requires further study, but is beyond the scope of this Article.³²

B. "CONVICTIONS" DEFINED

Harm caused by administration of the criminal justice system may

30. See, e.g., Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms art. 5(5), Nov. 4, 1950, 213 U.N.T.S. 221, 228 (providing compensation to anyone who has been unlawfully arrested or detained); Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 22, 1984, Europ. T.S. No. 117 (providing compensation to convicts who have been pardoned or who have had convictions overturned on ground of miscarriage of justice). See generally Stuart Beresford, Comment, *Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, Prosecuted, or Convicted by the Ad Hoc Tribunals*, 96 AM. J. INT'L L. 628 (2002) (examining remedies available under the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda); Anders Bratholm, *Compensation of Persons Wrongfully Accused or Convicted in Norway*, 109 U. PA. L. REV. 833 (1961) (examining Norway's strict liability provisions for compensation for wrongful conviction or accusation); Sheryl Grant, Note, *The International Criminal Court: The Nations of the World Must Not Give in to All of the United States Demands If the Court Is to Be a Strong, Independent International Organ*, 23 SUFFOLK TRANSNAT'L L. REV. 327 (1999) (examining remedies available under the Rome Statute of the International Criminal Court).

31. Cf. *Julian v. State*, 52 P.3d 1168, 1172 (Utah 2002) (holding that post-conviction motion for new trial based on newly discovered evidence should be evaluated under intermediate burden requiring showing that the newly discovered evidence "must render a different result substantially likely at retrial," rather than a minimal burden requiring a showing that newly discovered evidence renders a different result probable at retrial, or a higher burden requiring a showing that no reasonable trier of fact could have found the defendant guilty of the offense beyond a reasonable doubt).

32. For an excellent discussion of the significant policy considerations involved in defining and assigning burdens of production and persuasion, see John Sanchez, *The Law of Retaliation After Burlington Northern and Garcetti*, 30 AM. J. TRIAL ADVOC. 539 (2007), reviewing public employee actions for First Amendment work-related speech.

range over a broad spectrum: from the bruises on an innocent bystander who was ordered to “get down” and then had his ankle, knee and back stepped on when police officers executed a search warrant at a garage,³³ to the years spent on death row by the person subsequently exonerated based on DNA evidence,³⁴ and everything in between. Cases in between might include the situation where police officers fire a dozen tear gas canisters into a convenience store, where a fleeing felony suspect is hiding, and cause over \$275,000 in damage.³⁵ Another example might be where a landfill company which applied for a landfill use permit is investigated for ties with organized crime, and its business is seriously harmed when the report of the investigation is released to the press even though the company is found to be “clean” of any mob ties.³⁶ A third example might be the case of a Cypriot who becomes a director of a Libyan-controlled company and is prohibited from exercising valuable stock options by a Reagan-era Executive Order against Libyan-sponsored terrorism.³⁷ In each of these cases, across a broad spectrum, a person has been wrongfully deprived of the liberty to do what they otherwise would have been free to do but for the wrongful governmental conduct.

Most cases in just compensation jurisprudence have arisen outside the criminal justice setting. Governmental land use regulation, and more specifically, the exercise of the police power to zone, have given rise to most takings cases.³⁸ Just compensation jurisprudence, however, is far broader than the field of land use regulation. For example, in *Dames & Moore v. Regan*, the plaintiff complained that the freezing of Iranian

33. See, e.g., *Paul v. City of Rochester*, 452 F. Supp. 2d 223, 225–26, 229 (W.D.N.Y. 2006) (finding police conduct reasonable as a matter of law on summary judgment motion where Plaintiff was placed in handcuffs and made to lay face down on the ground for about thirty to forty-five minutes while officers searched the garage and arrested the suspect and plaintiff was released within an hour).

34. These situations of egregious harm are discussed below in Part II.

35. Compare *Customer Co. v. City of Sacramento*, 895 P.2d 900 (Cal. 1995) (denying recovery on grounds that benefit was conferred and that emergency existed), with *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38 (Minn. 1991) (holding owner in similar circumstances entitled to compensation). See generally JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES* § 7.07[3] (4th ed. 2006) (discussing state court decisions both ways in these types of scenarios).

36. See *WMX Technologies, Inc. v. Miller*, 197 F.3d 367, 376 (9th Cir. 1999) (denying recovery because no “property right” in business reputation). *Contra* *Sorrano's Gasco, Inc. v. Morgan*, 874 F.2d 1310 (9th Cir. 1989) (involving situation where letters describing investigation were sent to individual customers advising them not to deal with claimant).

37. See *Paradissiotis v. United States*, 304 F.3d 1271, 1272–73 (Fed. Cir. 2002) (finding that claimant received stock options in 1985, Executive Order was issued in 1986, and claimant became a director in 1986; therefore causing his own problem).

38. The zoning power's foundation in governmental authority to regulate for the public health, safety, welfare and morals, otherwise collectively known as the police power, is well-established. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387, 390 (1926). See generally 3 SANDS, LIBONATI & MARTINEZ, *LOCAL GOVERNMENT LAW*, *supra* note 4, §§ 16.50–16.53 (discussing takings in the land development regulation setting).

assets by the President under the power over foreign affairs improperly affected the plaintiff's property.³⁹ In *Summa Corp. v. California*, the state asserted a "public trust" easement under state constitutional authority over plaintiff's private land.⁴⁰ In *Kaiser Aetna v. United States*, the United States attempted to force the plaintiff to allow public access to plaintiff's private marina under the federal commerce power to regulate navigable waters.⁴¹ Another example involved a cigarette vending company prohibited from continuing to operate its vending machines by a new town ordinance.⁴² Even when the government condemns land, the landowner may make a claim for additional just compensation.⁴³

In both the criminal justice and civil settings, a person's liberty is restricted, preventing them from doing what they otherwise would like to do, but for the governmental conduct. Thus, it is arguable that a remedy should be provided for harm resulting from governmental conduct along the criminal justice spectrum—from being temporarily detained by police, to spending time on death row. Differences in the degree of harm may implicate different remedial concerns.

This Article, however, is limited to the wrongful conviction that results in incarceration, whether in informal custody, in jail, or in prison.⁴⁴ In those settings, the impact on the wrongfully convicted person—the deprivation of liberty and opportunity loss—is egregious.

C. INCIDENCE OF WRONGFUL CONVICTIONS IN THE UNITED STATES

Since there is no general agreement on what counts as "wrongful" or as a "conviction," there are no reliable statistics on the incidence of wrongful convictions in the United States.⁴⁵ Reported statistics vary

39. 453 U.S. 654, 666–67 (1981).

40. 466 U.S. 198, 200 (1984).

41. 444 U.S. 164, 168 (1979).

42. *Gen. Food Vending Inc. v. Town of Westfield*, 672 A.2d 760, 762, 765–66 (N.J. 1995) (denying recovery because the value of the vending machines was diminished, not destroyed, because cigarette sales is a highly regulated industry, and because the machines were not physically appropriated, but merely restricted in their use).

43. See 3 SANDS, LIBONATI & MARTINEZ, *LOCAL GOVERNMENT LAW*, *supra* note 5, § 21.26 (inverse condemnation). For a partial list of other settings that give rise to just compensation claims, see 4 C. DALLAS SANDS, MICHAEL E. LIBONATI & JOHN MARTINEZ, *LOCAL GOVERNMENT LAW* § 27.11 (2000) [hereinafter 4 SANDS, LIBONATI & MARTINEZ, *LOCAL GOVERNMENT LAW*] (liabilities and immunities by function); § 27.20 (police activities); § 27.21 (correctional activities); § 27.22 (fire protection, emergency rescue, and transportation); § 27.23 (regulatory and licensing activities), § 27.24 (service provision activities), § 27.25 (public facilities and improvements), § 27.26 (parks and recreational activities).

44. For consideration of takings claims in civil settings, see generally JOHN MARTINEZ, *GOVERNMENT TAKINGS*, *supra* note 4.

45. See, e.g., Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 525 (2005) ("There is no national registry of exonerations, or any simple way to tell from official records which dismissals, pardons, etc., are based on innocence. As a result, we learned about many of the cases in our database from media reports. But the media inevitably miss

depending on what definitions are used and the degree to which data is available in light of those definitions. For example, one study defined exoneration as “an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted.”⁴⁶ That study found 340 exoneration in the United States from 1989 through 2003.⁴⁷ These consisted of

327 men and 13 women; 144 of them were cleared by DNA evidence, 196 by other means. With a handful of exceptions, they had been in prison for years. More than half had served terms of ten years or more; 80% had been imprisoned for at least five years. As a group, they had spent more than 3400 years in prison for crimes for which they should never have been convicted—an average of more than ten years each.⁴⁸

The Cardozo Law School Innocence Project, by comparison, focuses on exoneration based on DNA evidence.⁴⁹ As of July 5, 2007, the Innocence Project website reports that “[t]here have been 204 post-conviction DNA exoneration in the United States.”⁵⁰

The Northwestern Law School Center on Wrongful Convictions (CWC) takes a third approach, defining its mission as combating “wrongful conviction and other serious miscarriages of justice.”⁵¹ The Center “uses the term ‘wrongful conviction’ and ‘exoneration’ synonymously to describe any case in which a defendant was convicted of a crime and later restored to the status of legal innocence.”⁵² The Center acknowledges that “[w]hile there is an obvious difference between legal innocence and actual innocence . . . [t]he cases included on the CWC list are those . . . in which there is evidence of actual innocence.”⁵³ The CWC’s statistics reach more broadly than those reported by the Cardozo Law School Innocence Project: “In addition to cases in which the defendant has been restored to legal innocence, the CWC list includes cases in which appellate courts ordered new trials and, in spite of compelling evidence of actual innocence, the defendant entered a plea of

some cases—and we, no doubt, have missed some cases that were reported.”).

46. *Id.* at 524.

47. *Id.* at 523–24.

48. *Id.*

49. The Innocence Project, *supra* note 7 (“dedicated to exonerating the innocent through post-conviction DNA testing”).

50. The Innocence Project, Facts on Post-Conviction DNA Exonerations, <http://www.innocenceproject.org/Content/351.php> (last visited Jan. 1, 2008). As of February 16, 2005, the Innocence Project had reported 174 such exoneration. See Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337, 337 n.1 (2006).

51. Center on Wrongful Convictions, <http://www.law.northwestern.edu/wrongfulconvictions/> (last visited Jan. 1, 2008).

52. Center on Wrongful Convictions, Criteria for Cases Listed as Exonerations, <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/> (last visited Jan. 1, 2008).

53. *Id.*

guilty in order to secure prompt release.”⁵⁴ The CWC has statistics for most states;⁵⁵ for Illinois, alone, where the CWC is based, it reported 101 exonerations.⁵⁶

Although there are no consistent statistics of wrongful convictions in the United States, because the studies use differing definitions of wrongful convictions, the numbers evidence a real problem in the criminal justice system. Since the stakes are so high when incarceration is involved, the problem demands our concern and attention.

II. CURRENT STATUS OF LEGAL DOCTRINE FOR PROVIDING COMPENSATION FOR WRONGFUL CONVICTIONS: THE CASE OF MICHAEL RAY GRAHAM, JR. AND ALBERT BURRELL

Michael Ray Graham, Jr., and Albert Burrell were sentenced to death for the murder of an elderly couple.⁵⁷ On December 28, 2000, after they had spent more than thirteen years on death row, the Louisiana Attorney General dismissed all charges against them because there was a “‘total lack of credible evidence’ linking either man to the crime.”⁵⁸ Upon release, each man was given ten dollars and a denim jacket, just like every other inmate released from prison in Louisiana, regardless whether they had been exonerated, like Graham and Burrell, or whether they had simply finished serving their time.⁵⁹

On December 26, 2001, Graham and Burrell filed a civil complaint seeking recovery personally against the prosecutors, the sheriffs and deputy sheriffs, and a laboratory investigator.⁶⁰ The complaint also

54. *Id.*

55. Center on Wrongful Convictions, The Exonerated: Exonerations in All States, <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/usIndex.html> (last visited Jan. 1, 2008).

56. Center on Wrongful Convictions, Illinois Wrongful Convictions, <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ilIndex.html> (last visited Jan. 1, 2008).

57. Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 82 n.80 (2003); *see also* Alberto B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 665–69 (2002) (discussing further Michael Ray Graham, Jr.’s conviction and subsequent exoneration); Steven M. Pincus, *“It’s Good to Be Free” An Essay About the Exoneration of Albert Burrell*, 28 WM. MITCHELL L. REV. 27, 32 n.8 (2001) (discussing exoneration of Albert Burrell, who was represented by Mr. Pincus and who had been convicted and sentenced to death along with Michael Ray Graham, Jr.).

58. Complaint at 2, *Burrell v. Adkins*, No. 3:01CV2679 (W.D. La. filed Dec. 26, 2001).

59. LA. REV. STAT. ANN. § 15:866 (2005); *see also* 1988 La. Acts 377, § 1 (amending statute in 1988 and increasing the amount to twenty dollars, but making no mention of a denim jacket); Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 48 & n.60 (2005) (assisting in the representation of Mr. Graham in his subsequent civil case was Mr. Garrett). Mr. Graham could not even afford to get back home to Virginia; his lawyers bought him the \$127 Greyhound bus ticket so he could get home. Lopez, *supra* note 57, at 669–70 n.25 (“[N]oting denim jacket was five sizes too large.” (citing *Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong. (2001) (statement of Michael Graham))).

60. Complaint, *supra* note 58, at 5–7.

sought recovery against the North Louisiana Criminalistics Laboratory and against the various insurance companies that insured the defendants.⁶¹ Recovery was also sought against the governmental entities involved.⁶² The complaint sought \$25,000,000 in compensatory damages and \$50,000,000 in punitive damages.⁶³

The fundamental contention by Graham and Burrell was that

defendants in this action coerced perjured testimony, fabricated evidence, ignored and later suppressed exculpatory evidence, and filed false affidavits of probable cause with the court, all in an effort to secure indictments and ultimately death sentences against two innocent men. According to a sworn affidavit from defendant/appellant Dan Grady, the decision to so proceed against plaintiffs was made entirely for political reasons—the then Union Parish District Attorney, defendant/appellant Tommy Adkins, directed Grady to seek an indictment over Grady's objections because Adkins did not want to embarrass the Union Parish Sheriff, defendant Kenneth Larry Averitt.⁶⁴

The complaint alleged claims under the Louisiana and federal constitutions for violation of the right to be free from unreasonable search and seizure, to equal protection of the law, to due process of law, to a fair trial and effective assistance of counsel, to be free from cruel and unusual punishment, and for violation of additional unenumerated rights under the state constitution.⁶⁵ The complaint also alleged common law claims of infliction of emotional distress,⁶⁶ malicious prosecution,⁶⁷ false arrest,⁶⁸ and wrongful conviction and imprisonment.⁶⁹ The last count of the complaint also alleged a direct action claim against the defendants' insurance carriers pursuant to Louisiana statute.⁷⁰ The claims seeking personal recovery against the prosecutors individually were dismissed on the basis of absolute prosecutorial immunity.⁷¹ The local Parish entity defendants remain in the case.⁷² As of May 23, 2007, the federal district

61. *Id.* at 7–8.

62. *Id.* at 5–8 (naming as entity defendants the District Attorney and Sheriff Offices of Lincoln and Union Parishes of Louisiana, as well as the State of Louisiana).

63. *Id.* at 71–72.

64. Brief for Plaintiff-Appellees at 4, *Burrell v. Adkins*, 94 F. App'x 232 (5th Cir. 2004) (No. 03-30487).

65. Complaint, *supra* note 58, at 66 (summarizing constitutional claims).

66. *Id.* at 66–67.

67. *Id.* at 67–68.

68. *Id.* at 68–69.

69. *Id.* at 69.

70. *Id.* at 70–71.

71. *Burrell v. Adkins*, 94 F. App'x 232, 232–33 (5th Cir. 2004) (upholding dismissal of all claims against defendant prosecutors individually, reversing trial court's retention of one claim against defendant Grady).

72.

Messrs. Grady, Adkins and Levy filed Motions to Dismiss, and as a result, the action against Grady and Adkins individually has been dismissed, and a final judgment has been entered

court judge referred the matter to a magistrate for consideration of various motions by the parties.⁷³

After six years of litigation, the outlook for recovery of compensation by Graham and Burrell is bleak. Most claimants who seek compensation for the harm caused by wrongful convictions recover nothing.⁷⁴ One writer has characterized the effort to obtain compensation for the harm caused by wrongful convictions as “a lottery or a popularity contest.”⁷⁵

In theory, there is a panoply of claims available to a wrongfully convicted person.⁷⁶ But for various reasons, claims against government

as to them. . . . As against the District Attorney defendants, there remains an alleged so-called “Official Capacity” claim against former District Attorney Adkins and his successor, District Attorney Robert Levy.

Memorandum in Support of Motion for Judgment on the Pleadings and for Summary Judgment; Alternatively Partial Summary Judgment; Alternatively for Dismissal Due to Failure to Respond to Discovery, Filed on Behalf of Former District Attorney Tommy Adkins and District Attorney Robert Levy at 6, *Burrell v. Adkins*, No. 01-2679-M (W.D. La. Nov. 7, 2006) [hereinafter Memorandum in Support of Motion for Summary Judgment].

73. Order of Reference, *Burrell v. Adkins*, No. 01-2679-M (May 23, 2007) (referring for consideration of various defendants’ motions for summary judgment, for judgment on the pleadings, and to strike plaintiff’s expert report).

74. See, e.g., Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 92 (1999) (“[N]either traditional fault-based tort actions nor civil rights statutes provide a remedy [for the wrongfully convicted].”); Lopez, *supra* note 57, at 673 (2002) (pointing out that “only 37% of wrongfully convicted persons actually receive compensation” (citing BARRY SCHECK ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* 230 (2000))); Evan J. Mandery, Commentary, *Efficiency Considerations of Compensating the Wrongfully Convicted*, 41 CRIM. LAW BULL. 287, 292 (2005) (“[T]he statistical likelihood of recovering on a valid claim . . . appears to be minimal.”). See generally Shawn Armbrust, Note, *When Money Isn’t Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 AM. CRIM. L. REV. 157 (2004) (suggesting a holistic approach to compensate wrongfully convicted claimants for actual harms suffered); Natasha L. Brooks, Comment, *Texas, Step Up to the Plate and Compensate: Face to Face with Joyce Ann Brown, Wrongfully Convicted Never to Receive Compensation*, 4 SCHOLAR 45, 50–57, 76–79 (2001) (examining problems faced by the wrongfully convicted in their largely unsuccessful efforts to obtain compensation and suggesting changes to Texas wrongful conviction compensation statute, TEX. CIV. PRAC. & REM. CODE ANN. § 103.001 (Vernon 1997), which was rewritten in 2001, TEX. CIV. PRAC. & REM. CODE ANN. § 103.001 (Vernon 2001), as amended by Act of June 15, 2001, ch. 1488, § 103.001, 2001 Tex. Gen. Laws 5280-82); Christine L. Zaremski, Comment, *The Compensation of Erroneously Convicted Individuals in Pennsylvania*, 43 DUQ. L. REV. 429 (2005) (evaluating critically the relative absence of recovery for wrongful conviction harm in Pennsylvania). For discussions on international remedies for wrongful convictions see Stuart Beresford, Comment, *Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, Prosecuted, or Convicted by the Ad Hoc Tribunals*, 96 AM. J. INT’L L. 628, 632–33 (2002) (examining remedies available under the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda), and Grant, *supra* note 30.

75. Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 708 (2004).

76. The possible claims may be viewed in terms of the following organizational structure:

I. State-Level Defendants

A. Entity State-Level Defendants

1. State Law Claims

a. Common Law

entities and their employees are unlikely to succeed. First, the elements of the claims themselves may pose substantial obstacles to recovery. For example, a claim for malicious prosecution may give rise to recovery of general damages, as well as to compensation for any arrest or imprisonment, including damages for discomfort or injury to health, loss of time and deprivation of society.⁷⁷ The elements of a claim for malicious prosecution, however, are formidable: a plaintiff must prove (1) the individual was prosecuted without probable cause; (2) the prosecution occurred with malice, or recklessness to the lack of probable cause; and (3) the prosecution ultimately terminated in favor of the accused.⁷⁸ Such claims are therefore typically unsuccessful because police can usually credibly testify that they had probable cause.⁷⁹

Similarly, in order to successfully bring a § 1983 claim against a local

-
- b. Statutory
 - c. Constitutional
 - 2. Federal Law Claims
 - a. Common Law
 - b. Statutory
 - c. Constitutional
 - B. Individual State-Level Defendants
 - 1. State Law Claims
 - a. Common Law
 - b. Statutory
 - c. Constitutional
 - 2. Federal Law Claims
 - a. Common Law
 - b. Statutory
 - c. Constitutional
 - II. Local Government-Level Defendants
 - A. Entity Local Government-Level Defendants
 - 1. State Law Claims
 - a. Common Law
 - b. Statutory
 - c. Constitutional
 - 2. Federal Law Claims
 - a. Common Law
 - b. Statutory
 - c. Constitutional
 - B. Individual Local Government-Level Defendants
 - 1. State Law Claims
 - a. Common Law
 - b. Statutory
 - c. Constitutional
 - 2. Federal Law Claims
 - a. Common Law
 - b. Statutory
 - c. Constitutional

77. W. KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS 870 (5th ed. 1984).

78. *Id.* at 871.

79. See Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 50–51 (2005) (discussing this critical weakness of the claim).

government or government official for wrongful conviction resulting from a violation of a federal right, the claimant must show that the conviction “has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, . . . or called into question by a federal court’s issuance of a writ of habeas corpus.”⁸⁰ Such claims are almost universally unsuccessful.⁸¹

Second, the formidable obstacle of governmental sovereign immunity must be overcome, either by governmental waiver or because it is overridden by constitutional command.⁸² Indeed, the claims by Graham and Burrell against the individual prosecutors in their personal capacities were dismissed on the grounds of absolute prosecutorial immunity.

Third, claims against governmental defendants individually in their personal capacities usually fail to meet the high standards of proof required under state and federal law, which demand that claimants prove the defendants acted intentionally or recklessly; that defendants acted outside the scope of their employment; or that defendants acted while under the influence of drugs or alcohol.⁸³ Thus, in the Graham-Burrell case, the defendants’ motion for summary judgment and for judgment on the pleadings targeted this dimension of the plaintiffs’ burden of proof.⁸⁴

Fourth, additional hurdles stand in the path of recovery against the deep pockets of the governmental-entity defendants in these settings. For claims under state law, the claimant must demonstrate that the

80. *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994) (“We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a section 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus, 28 U.S.C. § 2254.”).

81. *See* Garrett, *supra* note 79, at 39 (discussing this stacking of the odds against recovery by those wrongfully convicted as the “larger project” yet to be developed).

82. *See* MARTINEZ & LIBONATI, *STATE AND LOCAL GOVERNMENT LAW*, *supra* note 4, at 179–82 (2000) (discussing the principle of sovereign immunity under state law); MARTINEZ, *GOVERNMENT TAKINGS*, *supra* note 5, at pt. III, ch. 14 (discussing sovereign immunity and takings law, including state, local and federal defendants). For an extended discussion of the principle of sovereign immunity, see John Martinez, *Hurry Up and Wait: Negative Statutes of Limitation in the Government Tort Liability Setting*, 19 ST. JOHN’S J. LEGAL COMMENT. 259, 266–84 (2005).

83. *See* MARTINEZ & LIBONATI, *STATE AND LOCAL GOVERNMENT LAW*, *supra* note 4, at 204–09 (explaining that state or local government defendant must be shown to have violated the applicable standard of care, whether through negligence, recklessness or intentional conduct); 4 SANDS, LIBONATI & MARTINEZ, *LOCAL GOVERNMENT LAW*, *supra* note 43, at § 27:14 (standard of care under state law), § 27:15 (duty and standard of care under § 1983), § 27:21 (entity and individual governmental employee liability arising from correctional activities).

84. *See, e.g.*, Memorandum in Support of Motion for Summary Judgment, *supra* note 72, at 11 (“Here we are, almost 20 years after the plaintiffs were indicted, tried and convicted, second-guessing the motives and actions of the prosecution.”).

governmental employee was acting within the scope of employment.⁸⁵ For federal law claims, the claimant must demonstrate that the governmental employee was implementing a “custom or policy” of the governmental entity.⁸⁶ In the Graham-Burrell case, the defendants’ motions for summary judgment and for judgment on the pleadings also targeted this aspect of the plaintiffs’ burden.⁸⁷

Most scholars who have examined the problem of providing compensation for the wrongfully convicted have suggested legislative solutions for wrongful-conviction claimants such as Graham and Burrell, but the same scholars have uniformly criticized legislative efforts as failures because they impose so many procedural and substantive hurdles to recovery that most wrongfully convicted people are denied compensation.⁸⁸ The same is true of the federal wrongful conviction

85. See 4 SANDS, LIBONATI & MARTINEZ, *LOCAL GOVERNMENT LAW*, *supra* note 43, at § 27:17 (vicarious liability—respondeat superior).

86. The “custom or policy” requirement derives from 42 U.S.C. § 1983, which provides:

Every person who, under color of statute, ordinance, regulation, custom, or usage of any State or Territory or District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

42 U.S.C. § 1983 (2000); see 4 SANDS, LIBONATI & MARTINEZ, *LOCAL GOVERNMENT LAW*, *supra* note 43, § 27:09 (42 U.S.C. § 1983: entity liability); MARTINEZ & LIBONATI, *supra* note 82, at 253–64 (2000) (claims against local-level *entity* defendants—the “custom or policy” requirement).

87. See, e.g., Memorandum in Support of Motion for Summary Judgment, *supra* note 72, at 25 (“It is obvious as a matter of law that no allegation of the plaintiffs’ complaint and no evidence adduced by the plaintiffs supports a pattern of violations by Mr. Adkins’ office, such that the adequacy of his training of the assistant district attorneys such as Mr. Grady was obviously likely to result in a constitutional violation.”).

88. See, e.g., Adele Bernhard, *supra* note 75, at 707 (“With this Article, I hope to motivate state legislators to enact responsible, practical compensation statutes . . .”); Adele Bernhard, *supra* note 74, at 92 (examining statutory compensation schemes); Lopez, *supra* note 57, at 704–21 (suggesting provisions for a model statute); see also Armbrust *supra* note 74, at 181; Brooks, *supra* note 74, at 50–57, 76–79; Christine L. Zaremski, *supra* note 74, at 452–53. See generally Ackerman, *supra* note 2, at 1063–64 n.82.

Only four of these jurisdictions—the District of Columbia, New York, Tennessee, and West Virginia—impose no statutory ceiling on compensation. D.C. Code Ann. §§ 1-1221 to 1-1225 (1981); N.Y. Jud. Ct. Acts Law § 8-b (McKinney 1989); Tenn. Code Ann. § 9-8-108(7) (1999); W. Va. Code Ann. § 14-2-13a (Michie 2000). The other jurisdictions providing relief are: Alabama, Ala. Code §§ 29-2-150 to -165 (2003) (providing \$50,000 for each year of incarceration, prorated for periods of less than a year, plus a discretionary amount that the committee in charge of compensation decisions may request from the state legislature); California, Cal. Penal Code §§ 4900–4906 (West 2000 & Supp. 2004) (providing \$100 per day, not included in gross income for the purposes of state income taxation); Illinois, 705 Ill. Comp. Stat. 505/8(c) (1999) (providing “for imprisonment of 5 years or less, not more than \$15,000; for imprisonment of 14 years or less but over 5 years, not more than \$30,000; for imprisonment of over 14 years, not more than \$35,000” plus cost-of-living adjustments); Iowa, Iowa Code Ann. § 663A.1 (West 1998) (granting attorneys’ fees and court costs, liquidated damages up to \$50 per day of incarceration, and up to \$25,000 per year of lost income directly related to conviction and imprisonment); Maine, Me. Rev. Stat. Ann. tit. 14, §§ 8241–8242 (West 2003) (allocating up to \$300,000 for damages and costs, which may not include punitive damages); Maryland, Md. Code Ann., State Fin. & Proc. § 10-501 (West, WESTLAW through 2003 Reg. Sess.) (providing actual damages due to confinement plus a reasonable sum for counseling); New Hampshire, N.H. Rev. Stat. Ann. § 541-B:14 (1997 &

compensation statute,⁸⁹ which has proved largely ineffectual and has been roundly criticized.⁹⁰

III. NORMATIVE FOUNDATIONS FOR PROVIDING COMPENSATION TO THOSE WRONGFULLY CONVICTED

Given that wrongful convictions inevitably will occur, and since existing legal doctrine does not provide compensation, it is necessary to critically examine the normative justifications for providing compensation. This section proposes a loss-spreading normative foundation for providing compensation to the wrongfully convicted and suggests that just compensation jurisprudence can be used to implement that normative justification.

Some have argued that there are utilitarian justifications for providing compensation for wrongful convictions. One such argument is based on the "deterrence" rationale: compensation deters governmental conduct that results in wrongful convictions.⁹¹ This assumes that wrongful convictions are the product of intentional, reckless, or negligent behavior, which can be prevented through deterrence. Moreover, it overlooks that even behavior that is not intentional, reckless, or negligent also may result in wrongful convictions. For example, a jury

Supp. 2003) (providing \$20,000); New Jersey, N.J. Stat. Ann. §§ 52:4C-1 to :4C-6 (West 2001) (granting the greater of twice the claimant's income in the year prior to his incarceration or \$20,000 for each year of imprisonment); North Carolina, N.C. Gen. Stat. §§ 148-82 to -84 (2003) (authorizing payments of \$20,000 per year, not to exceed \$500,000); Ohio, Ohio Rev. Code Ann. § 2743.48 (Anderson Supp. 2002) (providing \$40,330 per year of incarceration plus court costs, attorneys' fees, and lost wages); Texas, Tex. Civ. Prac. & Rem. Code Ann. §§ 103.052, 103.105 (Vernon Supp. 2004) (stating that an award determined by a court may not exceed \$500,000, and if the award is determined by the state comptroller, it is \$25,000 per year if the detention is for less than twenty years, and \$500,000 if twenty or more years); and Wisconsin, Wis. Stat. Ann. § 775.05 (West 2001) (awarding \$500 per year up to \$25,000, although the claims board may petition the legislature for additional compensation). These state programs impose other stringent requirements before recovery, sometimes making it an entirely discretionary matter.

Id. For a discussion of the international remedies, see Beresford, *supra* note 74 (examining remedies available under the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda); Grant, *supra* note 74. For a compilation of state wrongful-conviction statutes and their requirements, see the Appendix.

89. 28 U.S.C. §§ 1495, 2513 (2000).

90. See, e.g., Lopez, *supra* note 57, at 672-73 (pointing out that requirements that claimant prove he is not guilty or has been pardoned, and that he did not commit the offense charged, as well as the \$5,000 cap on recovery, make the statute practically useless); see also Prison Litigation Reform Act of 1996, 42 U.S.C. § 1997e(e) (2000) (restricting ability of prisoners to proceed *in forma pauperis* in federal courts and also curtailing their right to claim damages for psychological injury without accompanying physical injury); Laufer, *supra* note 5, at 387 ("[T]he federal compensation statute allows for the recovery of a very small award of damages. Even so, meeting the statutory requirements for recovery is difficult, indeed, and few petitioners are successful."); James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105, 106-07 (2000) (arguing that the Prison Litigation Reform Act of 1996 unconstitutionally deprives prisoners of equal protection).

91. See Howard S. Master, Note, *Revisiting the Takings-Based Argument for Compensating the Wrongfully Convicted*, 60 N.Y.U. ANN. SURV. AM. L. 97, 110-11 (2004).

may have been provided with all the evidence available at the time of trial and convicted the defendant. Subsequently available DNA testing of evidence might exonerate the defendant. There was no intentional, reckless or negligent behavior that led to the conviction. Since DNA science was not available at the time, the wrongful conviction could not possibly have been prevented through deterrence.

A second utilitarian argument is the “social insurance” rationale: society should provide compensation in order to spread the risk of wrongful convictions among taxpayers as a whole, in the same manner as workers’ compensation, unemployment insurance, or other forms of social insurance.⁹² The problem, however, is that no “wrongfully-convicted compensation system” has evolved. This is probably because it is almost unimaginable for legislatures or other policy makers to conceive of the wrongfully-convicted defendant in the same manner as those who have been injured in the workplace or who have lost their jobs through no fault of their own.⁹³

The reality is that we have an imperfect system of criminal justice in which we try our best to be right *most* of the time, but in which people will inevitably be wrongfully convicted, no matter how hard we try to avoid it.⁹⁴ Wrongful convictions are thus similar to the idea of maximum employment, which assumes—and perhaps seeks to maintain—about 6% unemployment, because full employment is simply beyond our reach.⁹⁵ Indeed, full employment may be undesirable because unemployment provides some “play” in the labor market that accounts for unemployed people who are looking for different or better jobs.⁹⁶ Unemployment also

92. See *id.* at 111–12 (discussing the analogy between wrongful convictions and social insurance programs).

93. Those who advocate for benefits for workers who lose their jobs through no fault of their own are referred to as “luck-egalitarians.” Nir Eyal, *Egalitarian Justice and Innocent Choice*, 2 J. ETHICS & SOC. PHIL. 1, 1 (2007) (noting no groundswell of such “luck-egalitarians” among legislatures or other policymakers advocating for benefits for the wrongfully convicted has arisen).

94. The imperfection of our criminal justice system is well accepted as dogma. See, e.g., Bernhard, *supra* note 74 (“[I]nnocent people have been and will continue to be, unjustly convicted, as an unfortunate but inevitable consequence of the routine operation of the criminal justice system”); Mandery, *supra* note 74, at 289 (“The proposition that innocent people are convicted in the United States is not especially controversial.”).

95. See Lucy A. Williams & Margaret Y.K. Woo, *The “Worthy” Unemployed: Societal Stratification and Unemployment Insurance Programs in China and the United States*, 33 COLUM. J. TRANSNAT’L L. 457, 495–96 & n.201 (1995) (discussing the concepts of “maximum employment” as distinguished from “full employment,” and noting that “the establishment and development of unemployment insurance was an alternative to policies which might have realized full employment”).

96. See Amy L. Wax, *Something for Nothing: Liberal Justice and Welfare Work Requirements*, 52 EMORY L.J. 1, 21 (2003) (“Although economists disagree about how much observed unemployment is ‘behavioral’ rather than ‘structural,’ few believe that joblessness could be pushed to zero.”); see also Philip Harvey, *Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously*, 33 COLUM. HUM. RTS. L. REV. 363, 451–55 (2002) (discussing “right to work” as method for addressing structural unemployment).

may avoid inflation by depressing wages.⁹⁷ We accommodate concerns about worker justice through the mechanism of unemployment insurance benefits. The same might be said of workers' compensation. We assume that no matter how hard we try to make the workplace completely safe, injuries will happen. Indeed, making the workplace absolutely safe may be undesirable because the costs of doing so would lead to exorbitant prices for goods and services. We therefore accommodate concerns about worker justice through the mechanism of workers' compensation.⁹⁸

Similarly, we accept that a certain proportion of criminal convictions will be "wrongful." This might be described as a utilitarian explanation which accepts that the operation of our criminal justice system simply tries to achieve the greatest good for the greatest number, and that by definition that means someone will be harmed even by the optimal operation of the system.⁹⁹ And, just like the 6% unemployment intrinsic to maintaining maximum employment rather than full employment, wrongful convictions benefit our society by allowing us to have a working—albeit imperfect—criminal justice system.¹⁰⁰ In that light, the search for a criminal justice system in which no wrongful convictions occur is a misguided quest for the Perfect, and the enemy of the Good.¹⁰¹

97. Williams & Woo, *supra* note 95, 495–96 ("This choice lives on today, enshrined in Federal Reserve Board monetary policy and United States government's fiscal policy that declares some baseline unemployment rate (currently 6%) to be 'full employment,' and holds that attempting to lower unemployment beyond this point will trigger uncontrolled inflation.").

98. See EDWIN M. BORCHARD, *supra* note 1, at 390 ("The workmen's compensation acts are perhaps the clearest illustration of this broad change in legal principle, which now applies to many cases in which any member of a large social group is subjected to the danger of recurring accident and where a more equitable distribution of the loss seems mandatory."); Paul J. Otterstedt, *A Natural Rights Approach to Regulatory Takings*, 7 TEX. REV. L. & POL. 25, 88 (2002) ("A well-crafted worker's compensation law would probably . . . [seek] to duplicate results acceptable under the natural law in a more efficient manner than is possible with individual lawsuits."); see also Eyal, *supra* note 93, at 1 ("[L]uck-egalitarians acknowledge the potential [in]justice of inequalities that result from . . . disadvantages that . . . result only from un-free choices, such as genetic disease and structural unemployment.")

99. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 2–3 (J.H. Burns & H.L.A. Hart eds., Methuen 1982) (1789) (greatest good for the greatest number).

100. See generally James W. Hubbell, *Retaliatory Discharge and the Economics of Deterrence*, 60 U. COLO. L. REV. 91, 108 (1989) ("The existence of error inevitably leads to trade-offs among the various goals of a legal system: overzealous enforcement of laws will result in the punishment of some innocent as well as guilty persons; too little enforcement will permit too many offenses to go unremedied; and, at some point, a commitment to improving an inherently imperfect justice system will consume an inordinate amount of resources while doing little to keep the innocent from being punished or to prevent wrongdoers from violating laws.").

101. See Nat'l Ass'n of Regulatory Util. Com'rs v. F.C.C., 737 F.2d 1095, 1147 (D.C. Cir. 1984) ("The Commission's work fell short of the ideal at several turns, but our review does not and cannot require perfection." (citing VOLTAIRE, DICTIONNAIRE PHILOSOPHIQUE (Dramatic Art 1794) ("Le mieux est l'ennemi du bien"—the best is the enemy of the good"))); see also F. Scott Kieff, *IP Transactions: On the Theory & Practice of Commercializing Innovation*, 42 HOUS. L. REV. 727, 731 n.9 (2005) (citing THE OXFORD DICTIONARY OF QUOTATIONS 716 (Angela Partington ed., 4th ed. 1996) (translating the saying "le mieux est l'ennemi du bien" as meaning "[t]he best is the enemy of the good" and

Even if complete avoidance of wrongful convictions were possible,¹⁰² it would be prohibitively expensive. We therefore accept a criminal justice system of limited false positives.¹⁰³

The fundamental problem with the conventional approach of treating wrongful convictions as “failures” of the criminal justice system, however, is that it leaves wrongfully convicted people free but uncompensated for the harm they have suffered.¹⁰⁴ There is no “social safety net,” as with workers’ compensation, unemployment insurance, or other forms of social insurance programs. Instead, even though we assume harm to wrongfully convicted individuals will occur, we nevertheless presume that freedom is sufficient recompense. But freedom alone is not enough for the person who has been chewed up by the criminal justice system and then spit out as wrongfully convicted, lacking compensation for the harm suffered.

If we instead accept that wrongful convictions are endemic to our criminal justice system, the task then becomes one of devising a system which provides compensation to those who will suffer from the inevitable wrongful convictions.¹⁰⁵ Such a system would redistribute the cost from the individual to the society as a whole, as the cost of having an admittedly less-than-perfect criminal justice system.¹⁰⁶ As it happens, such loss-spreading is the fundamental objective of just compensation

attributing the saying to VOLTAIRE, *DICIONNAIRE PHILOSOPHIQUE* (1770))).

102. In the film *MINORITY REPORT* (Twentieth Century Fox & Dreamworks Pictures 2002), three young people (“precogs”) have the ability to see what will happen in the future, so crimes can be prevented by incarcerating only those who would have committed the crimes. The movie was based on PHILIP K. DICK, *THE MINORITY REPORT AND OTHER CLASSIC STORIES* (2003). See generally Cynthia D. Bond, *Law as Cinematic Apparatus: Image, Textuality, and Representational Anxiety in Spielberg’s Minority Report*, 37 *CUMB. L. REV.* 25 (2006). Our criminal justice system, unfortunately, lacks the ability to convict only those who are factually guilty.

103. See Jonathan B. Wiener, *Whose Precaution After All? A Comment on the Comparison and Evolution of Risk Regulatory Systems*, 13 *DUKE J. COMP. & INT’L L.* 207, 224 (2003) (“The goal is not zero false negatives [and positives] but the best balance of the two types of errors that we can achieve.”).

104. See, e.g., Jonathan L. Entin, *Being the Government Means (Almost) Never Having to Say You’re Sorry: The Sam Sheppard Case and the Meaning of Wrongful Imprisonment*, 38 *AKRON L. REV.* 139, 141–53 (2005) (discussing JACK P. DeSARIO & WILLIAM D. MASON, *DR. SAM SHEPPARD ON TRIAL: THE PROSECUTORS AND THE MARILYN SHEPPARD MURDER* (2003)). “Compensation for wrongful imprisonment . . . recognizes that society has perpetrated an injustice on an individual who was incarcerated in violation of applicable legal standards.” *Id.* at 173.

105. For a similar conclusion, see Zaremski, *supra* note 74, at 431:

Two main theories have emerged to justify the notion of compensation for erroneously imprisoned individuals, namely: (1) a theory following the rationale of ‘eminent domain,’ and (2) a theory following the rationale of “strict liability.” The underlying basis for both of these theories is that “erroneous confinements are costs of operation to be borne by the system,” since “the prosecution of a crime (becomes) the function of the state alone.”

106. Cf. Mandery, *supra* note 74, at 298–301 (setting out efficiency justification for compensation schemes for the wrongfully convicted). See generally Laufer, *supra* note 5, 335–36, 385–87 (1995). State and federal erroneous conviction statutes force the claimant to demonstrate factual innocence, which is completely contrary to the ordinary presumption of innocence. *Id.*

jurisprudence.

Just compensation jurisprudence provides compensation in circumstances where we do not question the public policy advanced by governmental conduct, but simply seek to spread the resulting costs. Thus, the Federal Just Compensation Clause provides: "[N]or shall private property be taken for public use, without just compensation."¹⁰⁷

The Just Compensation Clause is meant "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."¹⁰⁸ The Just Compensation Clause therefore is a logical constitutional foundation for providing compensation to the wrongfully convicted.¹⁰⁹ Unfortunately, conventional Just Compensation Clause-based arguments for providing compensation for the wrongfully convicted have been seriously flawed.

IV. FLAWED "THING-THINKING": JUST COMPENSATION CLAUSE ARGUMENTS FOR PROVIDING COMPENSATION TO THE WRONGFULLY CONVICTED

From time to time, scholars have suggested that Just Compensation Clause arguments should be used for compensating victims of wrongful convictions. As early as 1912, Edwin M. Borchard and John H. Wigmore urged compensation for those wrongfully convicted.¹¹⁰ Borchard focused his attention on the problem of overcoming common law principles of sovereign immunity that prevented governments from being held liable in tort.¹¹¹ He subsequently put the two fields together in a book that documented sixty-five cases of wrongful conviction and urged: "[I]f . . . an innocent man is convicted of crime . . . the least that the State can do to vindicate itself and make restitution to the innocent victim is to grant him an indemnity, not as a matter of grace and favor but as a matter of right."¹¹² He also proposed a model statute, which resulted in the enactment of the federal statute providing for compensation to the wrongfully convicted.¹¹³ Borchard based his arguments squarely on Just Compensation Clause principles:

Although my major interests lie in an aspect of the law somewhat remote from criminal law, I have nevertheless long urged that the State or community assume the risks of official wrongdoing and error instead

107. U.S. CONST. amend. V.

108. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). See generally MARTINEZ, GOVERNMENT TAKINGS, *supra* note 4.

109. See Master, *supra* note 91, at 117–20.

110. See Edwin M. Borchard, *European Systems of State Indemnity for Errors of Criminal Justice*, 3 J. CRIM. L. & CRIMINOLOGY 684, 705–06 (1912); John H. Wigmore, *The Bill to Make Compensation to Persons Erroneously Convicted of Crime*, 3 J. CRIM. L. & CRIMINOLOGY 665, 665–67 (1912).

111. Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 1 (1924).

112. EDWIN M. BORCHARD, *supra* note 1, at xxiv.

113. *Id.* at 417–21; see also 28 U.S.C. §§ 1495, 2513 (2000).

of permitting the losses resulting from such fault or mistake to be borne by the injured individual alone.¹¹⁴

Borchard also provided an excellent world history of compensation for wrongful convictions, spanning from ancient Greece and Rome, through European and Latin American systems for providing such compensation, to legislation in the United States providing such remedies as of 1932.¹¹⁵ All of these proposals, however, have utilized a “thing-thinking” conception of property, a conception that ultimately dooms the proposals to failure.

A physical definition of property treats property as consisting of “things,” such as cars or land.¹¹⁶ The physical conception of property has proved resilient because of the intuitive, common-sense appeal that property is something we can touch, see or feel.¹¹⁷ Such a conception, however, is a seriously flawed foundation for wrongful conviction relief. Existing Just Compensation Clause theories for providing compensation to the wrongfully convicted emerged from “thing-thinking” conceptions of property. For example, in one article the author argues that

114. BORCHARD, *supra* note 112, at vii; see also *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (explaining that the federal Just Compensation Clause is meant “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”).

115. BORCHARD, *supra* note 112, at 380–87. Several student notes have addressed this issue as well. See, e.g., John J. Johnston, Comment & Note, *Reasonover v. Washington: Toward a Just Treatment of the Wrongly Convicted in Missouri*, 68 UMKC L. REV. 411, 413–14 (2000) (dismissing a Just Compensation Clause foundation for compensation for wrongful convictions because one cannot ostensibly be compensated for a deprivation of liberty); Joseph H. King, Jr., Comment, *Compensation of Persons Erroneously Confined by the State*, 118 U. PA. L. REV. 1091, 1092–93 (1970) (raising the possibility of takings as a theoretical foundation for compensation for the wrongfully convicted, but dismissing it, ostensibly because it is not strict-liability based; “the eminent domain thesis raises a specter of technical obstacles to recovery obfuscating the more immediate issue of redress”); Master, *supra* note 91, at 120–47 (2004) (focusing on decisions regarding governmental appropriations of labor as possible sources for constitutional takings claims for compensation for harm resulting from wrongful convictions); Ashley H. Wisneski, Note, *‘That’s Just Not Right’: Monetary Compensation for the Wrongly Convicted in Massachusetts*, 88 MASS. L. REV. 138, 145–47 (2004) (viewing Takings Clause as unlikely source because property is only tangible or real property); Zaremski, *supra* note 74, at 429–30 (discussing takings as a theoretical foundation for compensation for the wrongfully convicted, but merely urging state waiver of sovereign immunity or enactment of a state statute providing for such compensation rather than suggesting the possibility of an independent constitutional claim). For an examination of compensation for persons wrongfully detained in the war on terrorism, see Ackerman, *supra* note 2, at 1063–66. Ackerman notes that “[t]here has never been a Supreme Court decision squarely confronting an innocent’s claim to compensation under the Takings Clause.” *Id.* at 1063 n.81. He further notes that “[t]here has been remarkably little legal scholarship on this issue.” *Id.* at 1064 n.85. For an article discussing conceptualization of reparations for slavery based on Just Compensation Clause principles, see Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191 (2003).

116. For criticisms of this conception, see Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 18–19 (1927); Leon Green, *Relational Interests*, 31 ILL. L. REV. 35, 56–57 (1936); and Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 652–55 (1988).

117. Felix Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 359–61 (1954) (discussing “thing” conception of property).

the property that was 'taken' within the meaning of state or federal takings clauses was the value of the productive labor that was appropriated by government during imprisonment and either left to waste or used to provide services within prison for little or no compensation¹¹⁸

One envisions a lump of labor, like dough, left to waste in the middle of the prison floor by the government, or used to provide services for the government. The problem, of course, is that the labor helps to create property—the asset in question—and is not property in the legal sense.¹¹⁹

The turn toward viewing labor as the property involved is understandable, given John Locke's theory that because everyone owns his own person, everyone also owns the object of his labor.¹²⁰ That statement, however, is more metaphor than legal rule.¹²¹ As evidenced by restrictions on the sale of nonrenewable body organs such as corneas, it is folly to think one owns one's body in the same way as one owns a car.¹²²

Building on the example of the commodification of body parts, the "thing" conception that views the labor of the wrongfully convicted as the property in question runs into the moral conundrum of treating people as commodities. Thus, for example, analysis of the question of compensating victims of societal malfeasance, such as African-American slaves, or Japanese-Americans interned during World War II, must almost immediately confront the problem of treating people as commodities.¹²³ The issues raised by commodification of human beings—

118. Master, *supra* note 91, at 120. The author derives the conception from cases in which courts held that lawyers forced to represent indigent defendants had been deprived of their "property," in the form of the lawyers' labor. *Id.* at 121 n.82.

119. See Wenger, *supra* note 115 (using a similar "thing-thinking" conception of property for purposes of compensation for slavery under just compensation theory).

120. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287–88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); see also Otterstedt, *supra* note 98, at 31 ("The theory of classical liberal originalism . . . applied in this article to the problem of regulatory takings, is based on the premise that the ideals of the American Revolution, expressed in the Declaration of Independence, were Lockean in character.").

121. See generally Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1983 (2005) ("Courts have never recognized a 'property right over one's own person' . . ."). For a refutation of the utility of the statement that one has a property right over one's body, see LAWRENCE C. BECKER, PROPERTY RIGHTS, PHILOSOPHIC FOUNDATIONS 36–41 (1977) (setting out a similar distinction between general justification and specific justification of property rights).

122. See, e.g., *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 490 (Cal. 1990) (refusing to recognize spleen cells as objects of "property" rights); *State v. Powell*, 497 So. 2d 1188, 1192 (Fla. 1986) (refusing to recognize corneas as objects of "property" rights). See generally John Martinez, *A Cognitive Science Approach to Teaching Property Rights in Body Parts*, 42 J. LEGAL EDUC. 290 (1992).

123. See Joyce Davis, *Enhanced Earning Capacity/Human Capital: The Reluctance to Call It Property*, 17 WOMEN'S RTS. L. REP. 109, 109 (1996) ("Human capital [referring to the investment of time and money in self development to enhance skills and abilities.] is property and property is power.") See generally Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for*

even if in the service of providing reparations for the harm caused by slavery—has vexed both courts and commentators alike for some time.¹²⁴ Ultimately, commodification of people or human body parts founders not because the market cannot handle such commodities, but because we have moral, religious or cultural revulsions about treating people as things that we can treat as objects of property rights.¹²⁵

“Thing-thinking,” which views property as the asset, however, only serves to confound the task of providing compensation for the wrongfully convicted. It is more than unhelpful; it derails the entire project. We have to start again and reconsider what it is that we are protecting.

V. AT THE BOUNDARY BETWEEN LIBERTY AND PROPERTY: RELATIONAL PROPERTY AND WRONGFUL CONVICTIONS

A. PROPERTY IN THE DUE PROCESS AND JUST COMPENSATION CLAUSES

The Due Process Clauses of the federal constitution prohibit both the federal¹²⁶ and State¹²⁷ governments from depriving people of “life, liberty or property” without due process of law. The federal Just Compensation Clause,¹²⁸ as well as Just Compensation provisions in state constitutions,¹²⁹ prohibit the “taking” of “property” without payment of “just compensation.”

Both Due Process and Just Compensation Clauses thus address

Slavery, 58 N.Y.U. ANN. SURV. AM. L. 497 (2003); Monica Chowdry & Charles Mitchell, *Responding to Historic Wrongs: Practical and Theoretical Problems*, 27 OXFORD J. LEGAL STUD. 339 (2007); Dennis Klimchuk, *Unjust Enrichment and Reparations for Slavery*, 84 B.U. L. REV. 1257 (2004); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477 (1998) (canvassing reparation movements).

124. See, e.g., *Moore*, 793 P.2d at 488–90 (holding that spleen cells removed during surgery are not “property,” and thus cannot be “owned” either by the patient or by the hospital that removed them); Martinez, *supra* note 122, at 295 (arguing that rights to property might be disaggregated into their component parts, leading to limited “property” rights that might address the moral concerns of a body parts “bazaar”); see also Radhika Rao, *Genes and Spleens: Property, Contract, or Privacy Rights in the Human Body?*, 35 J. L. MED. & ETHICS 371, 371 (2007) (“The legal status of the human body is hotly contested, yet the law of the body remains in a state of confusion and chaos.”).

125. Radin has brilliantly explained this rationale in her classic article *Market-Inalienability*. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

126. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”).

127. U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of . . . property, without due process of law . . .”).

128. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

129. State just compensation provisions are similar to the federal Just Compensation Clause, except that many add that “damaging” of private property will also give rise to just compensation. See, e.g., CAL. CONST. art. I, § 19 (“Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.”); UTAH CONST. art. I, § 22 (“Private property shall not be taken or damaged for public use without just compensation.”).

protection of "property" from governmental conduct, but only Due Process Clauses refer to protection of "liberty" from government. The question thereby raised is whether the deprivation of "liberty" under the Due Process Clauses gives rise to the remedy of "just compensation" under Just Compensation Clause doctrine.

Although the United States Supreme Court has considered the relationship between the protection afforded by the Due Process Clauses and that provided by the Just Compensation Clause, it has not resolved this central question. In a case just after the Civil War, where the federal government was held to have taken the estate of Robert E. Lee without compensation for the establishment of Arlington Cemetery, the Court briefly discussed the relation between liberty protected under the Due Process Clause and the requirement of compensation under the Just Compensation Clause:

[T]he last two clauses of article 5 of the amendments to the constitution of the United States. . .[provide]: "That no person . . . shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation." Conceding that the property in controversy in this case is devoted to a proper public use and that this has been done by those having authority to establish a cemetery and a fort, the verdict of the jury finds that it is and was the private property of the plaintiff, and was taken without any process of law and without any compensation. Undoubtedly those provisions of the constitution are of that character which it is intended the courts shall enforce, when cases involving their operation and effect are brought before them. The instances in which the life and liberty of the citizen have been protected by the judicial writ of *habeas corpus* are too familiar to need citation, and many of these cases, indeed almost all of them, are those in which life or liberty was invaded by persons assuming to act under the authority of the government. *Ex parte Milligan*, 4 Wall. 2. If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law and devoted to public use without just compensation?¹³⁰

In 1938, in footnote four of *United States v. Carolene Products Co.*, the Court held that it would exercise strict judicial review for protection of individual liberties, but only rational relationship review for protection of property rights under the federal constitution.¹³¹ That case dealt with the institutional position of the Court vis-a-vis the other branches of the federal government and the States, however, and not with whether the remedy of just compensation would be triggered by deprivations of

¹³⁰. *United States v. Lee*, 106 U.S. 196, 218 (1882).

¹³¹. 304 U.S. 144, 152 n.4 (1938).

liberty without due process.

More recently, in its 2005 decision in *Lingle v. Chevron U.S.A. Inc.*,¹³² the Court held that the Just Compensation Clause protects against untoward burdens on the property rights of an owner, not on the logically antecedent inquiry about the validity of governmental conduct.¹³³ The Court thereby suggested that whether governmental action is valid is the province of the Due Process Clause, whereas the Just Compensation Clause focuses on the nature and extent of the *burden* imposed on the owner.¹³⁴ *Lingle* concerned a state-imposed cap on the rent which oil companies in Hawaii could charge independent lessee-dealers. Thus, the Court did not consider, nor was it required to address, whether the remedy of just compensation would be triggered by deprivations of liberty without due process in the context of wrongful convictions.

B. THE ESSENTIAL LINK BETWEEN LIBERTY AND PROPERTY

Liberty and property are equally indispensable for achieving the ideal of individual self-realization. Viewed through that lens, John Locke's philosophy about legal recognition of property rights can be seen as a re-affirmation of individual freedom.¹³⁵ One must have liberty in order to mix one's labor with natural resources and produce assets of value in the marketplace which one can then call one's own.¹³⁶

And conversely, one must have property in order to be truly free. As Justice Thurgood Marshall observed in 1980: "The constitutional terms 'life, liberty, and property' . . . establish[] a sphere of private autonomy which government is bound to respect."¹³⁷

132. 544 U.S. 528 (2005).

133. See MARTINEZ & LIBONATI, *supra* note 82, at 6–7 (noting first question as whether government has "power," and second question as whether there is a "limitation" on that power).

134. *Lingle*, 544 U.S. at 539 ("Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.").

135. See Catherine Valcke, *Locke on Property: A Deontological Interpretation*, 12 HARV. J.L. & PUB. POL'Y 941, 944 (1989) ("The inconsistencies of which Locke has been accused are solved when his theory is interpreted by appeal to the ideal of individual self-realization rather than to that of common survival.").

136. JOHN LOCKE, *The Second Treatise of Civil Government*, in TWO TREATISES OF GOVERNMENT, *supra* note 120, §§ 28, 34 (discussing "mixing" of labor with the common to create property); cf. BECKER, *supra* note 121, at 75–80 (setting out an argument for political liberty as a general justification for property rights). See generally MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* 33 (1976) ("Any man's property is *ipso facto* what he produces, i.e. what he transforms into use by his own efforts.").

137. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 93–94 (1980) (Marshall, J., concurring); see also Valcke, *supra* note 135, at 1004–05 ("[A]ppropriation is more to mankind than a mere tool for physical subsistence; it plays a fundamental part in the development of individual autonomy."). For a

Liberty to acquire property rights represents the freedom to acquire authority over others in regard to assets we call our own.¹³⁸ Property is not an object apart from those who own, but intrinsic to the lives of the owners.¹³⁹ Property ownership fulfills various functions, including the ability to use assets for self-expressive, developmental, productive, and survival activities.¹⁴⁰ Property ownership also fulfills a “welfare function” intended to secure an individual’s claim to resources that are essential to a meaningful life.¹⁴¹ The liberty to acquire property rights thus is indispensable for a person to survive and, indeed, to thrive in our society.¹⁴²

Since deprivations of liberty brought about by wrongful convictions inevitably have economic consequences, such deprivations should be treated as a takings of property for which just compensation is constitutionally compelled.¹⁴³ Indeed, the obligation to provide compensation for deprivations of liberty is even more compelling than when mere economic assets are affected. In that sense, footnote four of *Carolene Products* was right: we should more jealously guard against deprivations of liberty than against deprivations of economic interests alone.¹⁴⁴

We therefore should provide a remedy when “liberty-property” is taken by the government through wrongful convictions.

C. RELATIONAL PROPERTY: TOWARD LIBERTY DEPRIVATIONS AS TAKINGS OF PROPERTY

The fundamental shortcoming of the “thing-thinking” conception of property is that its focus is misdirected onto the asset involved. Assets do

discussion of the functions that property serves in personal self-fulfillment, see John Martinez, *Reconstructing the Takings Doctrine by Redefining Property and Sovereignty*, 16 FORDHAM URB. L.J. 157, 190–93 (1988).

138. See Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 742–43 (1986) (“Property is an aspect of relations between people. It consists of decisionmaking authority[, which] . . . refers to the role of property as a claim that other people ought to accede to the will of the owner . . .”).

139. See generally Margaret Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959–61 (1982) (discussing the relation between assets and realization of the person through control of resources necessary for a full life).

140. See Baker, *supra* note 138, at 746–47 (describing these various functions of property rights).

141. *Id.* at 745; see also Martinez, *supra* note 137, at 157 (discussing the quasi-governmental power over people and things that property ownership entails).

142. See generally Wayne McCormack, *Lochner, Liberty, Property, and Human Rights*, 1 N.Y.U. J. L. & LIBERTY 432 (2005) (tracing history of general concept of liberty and its relation to protecting property rights and personal autonomy).

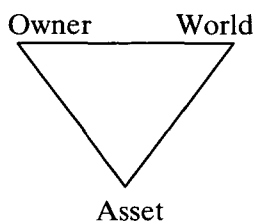
143. Cf. Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1952–54 (2005) (discussing legislative proposal and arguing that pretrial detention is a compensable “taking” by the state of one’s liberty but would exclude bail hearing detentions of forty-eight hours or less, as well as home detention and electronic monitoring).

144. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

not have rights; people have rights. In order to move toward understanding liberty deprivations as takings of property, we therefore need to move from “thing-thinking” to “relational-thinking” in regard to property.

A relational conception treats property as legal relations.¹⁴⁵ The focus of relational property is on the “bundle of rights,” consisting of the rights to exclude, use, and transfer among people in reference to assets. In contrast, “thing-thinking” conceptions of property focus on the asset involved, rather than on the legal rights of the people involved.¹⁴⁶

The distinction can be viewed in cognitive terms¹⁴⁷ as an inverted triangle, in which the Asset is at the bottom of the triangle, the Owner is at the top left and the World is at the top right, as follows:



In “thing-thinking,” the property is conceived as the asset at the bottom of the triangle. In relational thinking, the property is conceived as the legal relation between the Owner and the World, expressed in terms of the bundle of rights to exclude, use, and transfer. Thus, “thing-thinking” conceives of property as the asset involved, as in the expression, “the car is my property.” A relational conception expresses “property” as the rights to exclude, use, and transfer *in relation to the World*, with respect to the Asset. Thus, in relational terms, one might express ownership of a car as: “in relation to the World, I can use, transfer, and exclude others with respect to my car.”

Relational thinking thus focuses on *rights*, not on *assets*.

145. See generally Cohen, *supra* note 116, at 8; Green, *supra* note 116, at 35; Singer, *supra* note 116, at 611.

146. A variant of “thing-thinking” describes “property” as the relation of people to assets. See, e.g., Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 531 (2005) (“[P]roperty law recognizes and helps create stable relationships between persons and assets . . .”); see also Menachem Mautner, “*The Eternal Triangles of the Law*”: *Toward a Theory of Priorities in Conflicts Involving Remote Parties*, 90 MICH. L. REV. 95, 124 n.97 (1991) (explaining the atavistic notion that we have relations with our assets); Valcke, *supra* note 135, at 971 (“[O]ne can view property as a relational phenomenon among individuals rather than as an absolute bond between an individual and a thing.”). This variant of “thing-thinking” thus takes the discussion only halfway toward focusing on the relations *among people* with respect to assets.

147. For a discussion of the use of cognitive conceptions to describe legal relations, see Martinez, *supra* note 122, at 290.

Accordingly, relational property, like liberty, consists of rights.

The United States Supreme Court also has recognized the distinction between “thing-thinking” and “relational” thinking about property. In *United States v. General Motors Corp.*, the Court explained that the term “property” in the federal constitution is not

used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law . . . [but instead] in a more accurate sense to denote the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it.¹⁴⁸

In *General Motors*, the United States government condemned a one-year sublease of General Motor’s lease of a warehouse.¹⁴⁹ The government contended that the “property” condemned consisted only of the physical lease premises.¹⁵⁰ The Court held instead that the “property” condemned consisted of the lease premises, plus the cost of removing General Motors’ personal property from the building which was necessitated by the taking, as well as the value of General Motors’ equipment and the value of fixtures which were taken, destroyed, or reduced in value by the Government’s action.¹⁵¹ The additional items of personal property, equipment and fixtures, the Court held, were also part of the “property” condemned, in addition to the value of the lease premises.¹⁵² The Court thereby protected General Motor’s right to exclude the federal government from interfering with General Motors’ ability to continue its operations and maintain its relations with its customers. Property protected by the Federal Constitution, therefore, is not the physical thing, but a person’s legal rights in relation to other people with respect to assets.

State courts similarly define property in terms of a person’s legal rights in relation to other people with respect to assets.¹⁵³ For example, in *Rigney v. City of Chicago*,¹⁵⁴ the rental value of an owner’s land had been reduced from \$60 a month to \$23, and the market value of the land had been reduced by two-thirds, as a result of the city’s elevating the level of

148. 323 U.S. 373, 377–88 (1945).

149. *Id.* at 375.

150. *Id.* at 376.

151. *Id.* at 383–84.

152. *Id.* at 381–84.

153. See, e.g., *Morley v. Jackson Redev. Auth.*, 632 So. 2d 1284, 1297 (Miss. 1994) (involving restrictive covenant protectible property interest); *McNamara v. Rittman*, 838 N.E.2d 640, 645 (Ohio 2005) (involving property interest in groundwater underlying land); *Lincoln Loan Co. v. State Highway Comm’n*, 545 P.2d 105, 109 (Or. 1976) (involving impact on land of pre-condemnation blight); *Colman v. Utah State Land Bd.*, 795 P.2d 622, 625 (Utah 1990) (involving express easement); *Utah State Road Comm’n v. Miya*, 526 P.2d 926, 928–29 (Utah 1974) (involving implied easement).

154. 102 Ill. 64 (1881).

streets above the level of the land abutting the streets.¹⁵⁵ The court explained the distinction between “thing-thinking” and “relational” property conceptions thus:

Property, in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things and subjects, and generally to the exclusion of all others, and doubtless this is substantially the sense in which it is used in the constitution; yet the term is often used to indicate the *res* or the subject of the property, rather than the property itself, and it is evidently used in this sense in some of the cases in connection with the expression of physical injury, while at other times it is probably used in its more appropriate sense, as above mentioned. The meaning, therefore, of the expression “*physical injury*,” when used in connection with the term property, would in any case necessarily depend upon whether the term property was used in the one sense or the other. To illustrate: If the lot and buildings of appellant are to be regarded as property, and not merely the subject of property, as strictly speaking they are, then there has clearly been no physical injury to it; but if by property is meant the right of user, enjoyment and disposition of the lot and buildings, then it is evident there has been a direct physical interference with appellant’s property, and when considered from this aspect, it may appropriately be said the injury to the property is direct and physical¹⁵⁶

A relational understanding of “property” as legal rights therefore liberates us to consider compensation for wrongful convictions, which are deprivations of liberty rights.

VI. WRONGFUL CONVICTIONS AS RIGHTFUL TAKINGS: A RECONSTRUCTED JUST COMPENSATION JURISPRUDENCE FOR PROTECTION OF “LIBERTY-PROPERTY”

Conventional takings claims require that the claimant identify the property involved, the governmental conduct that has resulted in a taking of that property, and the just compensation to which the claimant is entitled.¹⁵⁷ This Article proposes that “liberty-property” takings claims entail (a) a wrongful conviction resulting in the taking of liberty which imposes economic harm; (b) strict liability regardless of fault; and (c) remedial considerations which shape the scope of “liberty-takings.”

A. THE TAKING OF LIBERTY: FOCUS ON THE HARM IMPOSED

One of the stumbling blocks erected by “thing-thinking” about property has been the problem of attempting to conceive of the manner in which an asset is “taken” by the government when a person is

¹⁵⁵ *Id.* at 69.

¹⁵⁶ *Id.* at 77–78.

¹⁵⁷ See generally 3 SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 4, § 16.53.20 (confusing takings cases on the merits: a three-part analytical framework).

wrongfully convicted.¹⁵⁸ This has led some to argue that the labor value of the person wrongfully convicted has been taken by the government.¹⁵⁹

A relational reconceptualization of property as legal rights focuses instead on the consequences of the deprivation of liberty. A wrongful conviction prevents the wrongfully convicted person from exercising the freedom to mix his or her labor with natural resources and thereby to create legal rights in relation to the world with respect to those assets. The deprivation of liberty thereby imposes harm that can be measured as the lost opportunity to establish legal rights in relation to the world with respect to assets.

A reconstructed just compensation jurisprudence, therefore, incorporates relational thinking about property rather than “thing-thinking” about property. That is, rather than asking, “What is the asset that has been ‘taken’ by government through wrongful convictions?” we should ask, “What is the economic loss to the person wrongfully convicted as a result of the deprivation of their liberty?”

This is consistent with the shift in just compensation jurisprudence away from focusing on the gain to the government and toward focusing instead on the loss suffered by the person whose property has been “taken.” Thus, the United States Supreme Court has emphasized that “the ‘just compensation’ required by the Fifth Amendment is measured by the property owner’s loss rather than the government’s gain.”¹⁶⁰ The Court has reiterated that just compensation jurisprudence focuses on the nature and extent of the burden imposed on the owner: “Although our regulatory takings jurisprudence cannot be characterized as unified . . . each of these tests focuses directly upon the severity of the *burden* that government imposes upon private property rights.”¹⁶¹

The requirement of just compensation thus is not premised on what the wrongdoer has gained, such as in unjust enrichment or restitutionary theories.¹⁶² Instead, the remedy of just compensation seeks to compensate for the burden on the person wrongfully convicted.

B. TAKINGS AS STRICT LIABILITY CLAIMS

As a general rule, takings are strict liability claims.¹⁶³ Thus, although

158. See BORCHARD, *supra* note 108, at 388 (“In the case of unjust conviction the State receives no equivalent. The deprivation of the liberty of the individual is no gain to the State.”).

159. See, e.g., Master, *supra* note 91, at 120.

160. Brown v. Legal Found. of Wash., 538 U.S. 216, 235–36 (2003).

161. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005) (emphasis added).

162. See Chowdry & Mitchell, *supra* note 123, at 344–45 (discussing gain-based arguments); see also Brophy, *supra* note 123, at 521 (2003) (noting that “reparations” talk raises the specter that benefits received by slaves would have to be set off from recovery for harm imposed on slaves by being held as slaves); Klimchuk, *supra* note 123, at 1275 (focusing on benefit to slave owners of treating slaves as things rather than as persons).

163. See generally Lingle, 544 U.S. at 548 (“[A] plaintiff seeking to challenge a government

a few courts have concluded otherwise,¹⁶⁴ fault, in the form of intentional, reckless or negligent conduct, need not be shown in order to impose liability for takings. Accordingly, a takings claim would be available regardless of whether a wrongful conviction has resulted from substantive or procedural wrongfulness.¹⁶⁵

C. REMEDIAL CONSIDERATIONS

The right to compensation for liberty deprivations, as with all rights, is not absolute. This Article has established a general justification for the existence of such a right, but that right is nevertheless subject to specific justification identifying the conditions for relief in particular cases.¹⁶⁶ Remedial considerations in the field of wrongful convictions thus include restrictions on such claims as well as defenses against them.

I. Compensation, Not Deterrence

It has been argued that the basic purposes of monetary remedies for constitutional violations include both compensation and deterrence.¹⁶⁷ It has been further argued that punitive damages for constitutional torts should be the norm rather than the exception in order to effectuate deterrence.¹⁶⁸ Such arguments are derived from the measure of damages for the common law tort of false imprisonment,¹⁶⁹ which may be

regulation as an uncompensated taking of private property may proceed under one of the [following] theories . . . by alleging a 'physical' taking, a *Lucas*-type 'total regulatory taking,' a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan and Dolan*.""); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Albers v. County of L.A.*, 398 P.2d 129, 263-64 (Cal. 1965) (inverse condemnation is strict liability claim); *Pacific Bell v. City of San Diego*, 96 Cal. Rptr. 897, 913 (Ct. App. 2000) ("Because damages caused by failure of a water delivery system do not resemble damages caused by failure of a flood control system, we conclude the . . . reasonableness test should not be extended to the facts of this case, and the ordinary rules of inverse condemnation strict liability for damages caused by public improvements are applicable."); *Barto Watson, Inc. v. City of Houston*, 998 S.W.2d 637, 642 (Tex. App. 1999) (holding that mistake is no defense to inverse condemnation claim under state law; need not allege intentional conduct).

164. Some courts, particularly in regard to flood control improvements, require a showing that the government acted negligently. *See, e.g., Bunch v. Coachella Valley Water Dist.*, 935 P.2d 796 (Cal. 1997) (holding that inverse condemnation is ordinarily a strict liability claim, except that reasonableness standard applies in flood control "common enemy" and in "emergency" settings). And a few courts require a showing that the government intended to take private property for public use. *See, e.g., Vokoun v. City of Lake Oswego*, 56 P.3d 396, 401 (Or. 2002) (holding that construction of storm drain not done with intent to take private property for public use); *Edwards v. Hallsdale-Powell Util. Dist. Knox County, Tenn.*, 115 S.W.3d 461, 467-68 (Tenn. 2003) (holding no taking where claimants' homes were flooded with raw sewage on two occasions absent purposeful or intentional actions and overruling contrary precedent).

165. For definitions of procedural and substantive wrongfulness, see Part I.A.1. above.

166. *Cf. BECKER, supra* note 121, at 3 (setting out a similar distinction between general justification and specific justification of property rights).

167. *See Jean C. Love, Presumed General Compensatory Damages in Constitutional Tort Litigation: A Corrective Justice Perspective*, 49 WASH. & LEE L. REV. 67, 68 (1992).

168. Michael Wells, *Punitive Damages for Constitutional Torts*, 56 LA. L. REV. 841, 858 (1996).

169. *Cf. Wallace v. Kato*, 127 S. Ct. 1091, 1095-96 (2007) (explaining that common law claim of false imprisonment is useful analogy in determining when statute of limitations starts to run for claim

summarized as follows:

The measure of damages for false imprisonment is such sum that would fairly and reasonably compensate the plaintiff for injuries caused by defendant's wrongful act, including damages for mental anguish, shame and humiliation, injury to reputation, physical suffering, loss of earnings, and legal expenses in defending a prior action so long as the damages are proximately caused by the illegal act.¹⁷⁰

Indeed, false imprisonment at common law gives rise to presumed damages even in the absence of actual damages because it is a type of "dignitary tort" which is "a technical assault [even] without physical harm."¹⁷¹ Punitive damages are also recoverable for such claims.¹⁷²

Viewed in relational terms, however, deprivations of liberty which give rise to the remedy of just compensation are fundamentally compensatory in nature. The objective is compensation, not deterrence. Thus, there are no "presumed damages" from violation of such rights.¹⁷³ Under a compensatory regime, the claimant must prove "actual injury," meaning "something personal to the plaintiff, such as pecuniary loss, pain or emotional distress."¹⁷⁴

under 42 U.S.C. § 1983 seeking damages personally against police officers for arrest that violated Fourth Amendment; involving a plaintiff's cause of action that accrued when he appeared before examining magistrate and was bound over for trial, not when conviction was later set aside or when prosecutors subsequently dropped all charges after appellate reversal of wrongful conviction).

170. *Kehrli v. City of Utica*, 482 N.Y.S.2d 189, 190 (1984); *see also* *Mumford v. Starmont*, 102 N.W. 662, 664 (Mich. 1905) (considering shame and mortification of wrong and of outrage); *Rainey v. Lorain Corr. Facility*, 700 N.E.2d 90, 93 (Ohio 1997) (holding that where plaintiff was imprisoned fourteen days beyond his lawful term, "the measure of damages for false imprisonment is that sum that will reasonably compensate the plaintiff for the wrong done him, which may include the injury to his feelings, damage to his reputation, and other elements which combined to make up the injury naturally flowing from the wrong").

171. 2 DAN B. DOBBS, *LAW OF REMEDIES* § 7.3(2) (2d ed. 1993).

172. *See, e.g.,* *Washington v. Farlice*, 2 Cal. Rptr. 2d 607, 614 (1991) (reversing \$50,000 punitive damage award, but remanding for re-determination based on evidence of appellant's financial condition at the time of re-trial).

173. *See, e.g.,* *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305 (1986) (allowing no award of damages based on abstract value of constitutional rights); *Carey v. Phipps*, 435 U.S. 247, 262-64 (1978) (allowing no presumed damages for violation of procedural due process); 2 DOBBS, *supra* note 171, § 7.4(2) ("[T]he Supreme Court has foreclosed the recovery of . . . presumed general damages." (citing *Jean C. Love, Damages: A Remedy for the Violation of Constitutional Rights*, 67 CAL. L. REV. 1242 (1979))).

174. 2 DOBBS, *supra* note 171, § 7.4(2) (citing *Love, supra* note 173, at 1259). For example, a federal district court held that the value of the harm imposed on defendants who had spent over thirty years in prison, some on death row, was \$1 million per year. *Limone v. United States*, 497 F. Supp. 2d 143 (D. Mass. 2007); *see also supra* note 10. The total damages award for the individuals and their families in the *Limone* case was \$101,750,000.00. *Limone*, 497 F. Supp. 2d at 154. Attorneys' fees are yet to be determined. Order Re: Damages at 2, *Limone v. United States*, No. 020V10890-NG (D. Mass. July 26, 2007) ("Plaintiffs shall submit a motion for attorneys' fees and costs, with supporting affidavits by September 17, 2007.").

2. *Claims Against Federal Entities and Officials*

The Fifth Amendment's Just Compensation Clause is self-executing, so takings claims against the federal government as an entity may be brought directly under the federal constitution.¹⁷⁵ The Tucker Act¹⁷⁶ is the usual vehicle for enforcing federal constitutional claims¹⁷⁷ against actors

175. *Jacobs v. United States*, 290 U.S. 13, 16 (1933). The right to just compensation was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because the duty to pay imposed by the [Fifth A]mendment.

Id.; see also *First English Evangelical Lutheran Church of Glendale v. County of L.A.*, 482 U.S. 304, 315 (1987) (“[I]t has been established at least since *Jacobs v. United States*, 290 U.S. 13 (1933), that claims for just compensation are grounded in the Constitution itself.”); *United States v. Clarke*, 445 U.S. 253, 257 (1980) (“[An action against the United States may be brought under the Fifth Amendment’s Just Compensation Clause because of] ‘the self-executing character of the constitutional provision with respect to compensation’” (citing 6 P. NICHOLS, *EMINENT DOMAIN* § 25.41 (3d rev. ed. 1972))); *United States v. Testan*, 424 U.S. 392, 401 (1976) (“These [Just Compensation] Fifth Amendment cases are tied to the language, purpose, and self-executing aspects of that constitutional provision”); *United States v. Causby*, 328 U.S. 256, 267 (1946) (“If there is a taking, the claim is ‘founded upon the Constitution’”); *Bundrick v. U.S.*, 785 F.2d 1009, 1012 (Fed. Cir. 1986); *Alder v. U.S.*, 785 F.2d 1004, 1009 (Fed. Cir. 1986) (“Appellants err in their premise that each taking claim under the Fifth Amendment requires a specific waiver of sovereign immunity. The Constitution had already achieved that popular right.”). See generally MARTINEZ, *GOVERNMENT TAKINGS*, *supra* note 5, § 4:3 n.1 (discussing self-executing nature of Just Compensation Clause); Douglas W. Kmiec, *The Original Understanding of the Takings Clause is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630, 1659–62 (1988) (discussing self-executing character of Fifth Amendment’s Just Compensation Clause); James E. Krier, *The Regulation Machine*, 1 SUP. CT. ECON. REV. 1, 11–12 (1982) (“The logic is straightforward. . . . If it is a taking, then compensation is required [because the Just Compensation Clause is self-executing]”)

176. The Tucker Act provides:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (2000); see also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016–17 (1984) (“Generally, an individual claiming that the United States has taken his property can seek just compensation under the Tucker Act, 28 U.S.C. § 1491.”); *Causby*, 328 U.S. at 267 (“If there is a taking, the claim is ‘founded upon the Constitution’ and within the jurisdiction of the Court of Claims to hear and determine.”).

177. In contrast, tort claims against the federal government are governed by the Federal Tort Claims Act. 28 U.S.C. §§ 2671–80 (2000). Since 1974, the federal government has allowed itself to be sued for certain intentional torts committed by federal “investigative or law enforcement officers.” 28 U.S.C. § 2680(h) (2000). The statute was amended in 1974 by Pub. L. No. 93-253, § 2, 88 Stat. 50, to add language allowing suits for “assault, battery, false imprisonment, false arrest, abuse of process or malicious prosecution.” See also *Limone v. U.S.*, 336 F. Supp. 2d 18, 29–30 (D. Mass. 2004) (reviewing the history of this 1974 amendment to the Federal Tort Claims Act). For a discussion of the distinctions between tort claims and constitutional claims against the federal government, see MARTINEZ, *GOVERNMENT TAKINGS*, *supra* note 5, at § 4:4.

Such tort actions, however, are inadequate substitutes for constitutional takings claims, for a myriad of reasons, including: (1) only conduct by “investigative or law enforcement officers,” defined as “any officer of the United States who is empowered by law to execute searches, to seize evidence,

whose conduct is undertaken pursuant to federal law on behalf of the United States.¹⁷⁸ Such claims ordinarily must be brought in the United States Court of Federal Claims.¹⁷⁹ However, federal district courts have concurrent jurisdiction to consider takings claims against the United States which do not exceed \$10,000 in amount.¹⁸⁰

With respect to suits against federal officials or employees in their individual, personal capacities, as a general rule, federal constitutional takings claims cannot be asserted because of the "state action" principle, which provides that federal constitutional protections only apply against governmental, not private, conduct.¹⁸¹ The United States Supreme Court has held, however, that such claims can be brought in limited situations, so at first blush, it is at least arguable that such claims should be available in the wrongful conviction setting as well. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Court held that claims for damages against federal narcotics agents could be brought directly under the Fourth Amendment's prohibition against unreasonable searches and seizures because "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."¹⁸² In *Davis v. Passman*, the Court similarly held that

or to make arrests for violations of Federal law" is covered, 28 U.S.C. § 2680(h) (2000); (2) the plaintiff must prove *intentional* conduct by the officers involved, whereas takings give rise to strict liability; (3) the statute of limitations for claims under the Federal Tort Claims Act is two years, *id.* § 2401(b), whereas the statute of limitations for takings claims is six years, *id.* § 2501; (4) the Federal Tort Claims Act requires that the plaintiff exhaust administrative remedies by "presenting" the claim to the federal agency involved, *id.* § 2675(a), whereas no such presentment is required for federal constitutional claims; (5) since the tort claims are Congressionally-created, they can be Congressionally-repealed, whereas takings claims are constitutional; and (6) the discretionary function exception in § 2680(a) shields the federal government from claims regarding the decision "whether, when and against whom to initiate prosecution." *Gray v. Bell*, 712 F.2d 490, 513 (D.C. Cir. 1983).

178. By comparison, if the conduct of federal actors is instead undertaken under color of *state* law, the usual vehicle for enforcing takings claims against such actors is 42 U.S.C. § 1983 (2000).

179. *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 12 (1990); *Causby*, 328 U.S. at 267; *Moden v. United States*, 404 F.3d 1335 (Fed. Cir. 2005).

180. 28 U.S.C. § 1346 (2000). This is known as the "Little Tucker Act," which provides:

The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of . . . any . . . civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . . [with the exception of cases] which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978.

Id.; see also *Clinton v. Goldsmith*, 526 U.S. 529, 540 n.14, (1999) (describing Little Tucker Act jurisdiction of federal district courts: "Appeals are taken to the Federal Circuit").

181. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 924 (1982); see Martin A. Schwartz, *Claims for Damages for Violations of State Constitutional Rights—Analysis of the Recent Court of Appeals Decision in Brown v. New York; The Resolved and Unresolved Issues*, 14 *TOURO L. REV.* 657, 660 (1998) ("Maybe this is just one of those curiosities in the history of American law, but the Congress has never enacted a counterpart statute to Section 1983 that authorizes claims for damages for federal constitutional violations against federal officials.")

182. 403 U.S. 388, 395 (1971).

a *Bivens* action could be brought under the Due Process Clause of the Fifth Amendment personally against a federal Congressman for gender discrimination.¹⁸³ And in *Carlson v. Green*, the Court implied a *Bivens* claim against federal prison officials under the Eighth Amendment for cruel and unusual punishment.¹⁸⁴

Since wrongful convictions deprive claimants of liberty under the Due Process Clause, it is therefore at least arguable that a *Bivens* action should be available against federal officials and employees in their personal capacity to enforce the just compensation requirement of the federal Just Compensation Clause. *Passman* implied an action under the Due Process Clause, and *Carlson* involved the correctional setting. The due process liberty deprivation in the wrongful conviction setting, and the concomitant compensation requirement of the Just Compensation Clause, thus would seem to fall in the same *Bivens* category.¹⁸⁵

The availability of a reasonable alternative statutory remedy, however, will probably preclude a *Bivens* claim.¹⁸⁶ In *Wilkie v. Robbins*, the United States Supreme Court held that a private landowner had no private right of action for damages under *Bivens* against officials of the Bureau of Land Management personally for harassment and intimidation allegedly aimed at extracting an easement across the landowner's private property.¹⁸⁷ The Court held that the landowner had other claims available and that the balance of reasons weighed against creating a new cause of action under the circumstances.¹⁸⁸ Significantly, perhaps, the Court appeared to distinguish circumstances where deprivations of liberty have

183. 442 U.S. 228, 234 (1979).

184. 446 U.S. 14, 24–25 (1980).

185. *Bivens* actions are available only against federal officials personally, not against the federal government entity. See *FDIC v. Meyer*, 510 U.S. 471, 486 (1994); see also *Wilkie v. Robbins*, 127 S. Ct. 2588, 2590 (2007) (holding that private landowner has no private right of action for damages under *Bivens* against officials of the Bureau of Land Management for violation of landowner's Just Compensation Clause right). The federal government entity can be sued, however, pursuant to the self-executing character of the Fifth Amendment's Just Compensation Clause. *Jacobs v. United States*, 290 U.S. 13, 16 (1933). See generally Jeremy Travis, *Rethinking Sovereign Immunity After Bivens*, 57 N.Y.U. L. REV. 597, 645–46 (1982) (distinguishing *Bivens* actions from cases brought under the self-executing Just Compensation Clause of the Fifth Amendment).

186. See, e.g., *Wilkie*, 127 S. Ct. at 2591–92 (holding private landowner has no private right of action for damages under *Bivens* against officials of the Bureau of Land Management for harassment and intimidation by BLM officials against landowner allegedly aimed at extracting an easement across landowner's private property because: first, landowner has plenty of other claims available; second, balance of reasons for and against creating new cause of action weighs against creating such new cause of action; and third, the landowner context is distinguishable from circumstances where liberty is deprived).

187. *Id.*

188. *Id.* at 2600 (“Here, the competing arguments boil down to one on a side: from *Robbins*, the inadequacy of discrete, incident-by-incident remedies; and from the Government and its employees, the difficulty of defining limits to legitimate zeal on the public's behalf in situations where hard bargaining is to be expected in the back-and-forth between public and private interests that the Government's employees engage in every day.”).

occurred.¹⁸⁹

In the wrongful conviction setting, therefore, it would not be surprising if the individual federal-official or employee defendant would contend that the federal wrongful conviction compensation statute represents an available alternative remedy that would similarly preclude a *Bivens* action asserting wrongful conviction claims.¹⁹⁰ That statute has proven ineffectual in providing relief in the wrongful conviction setting.¹⁹¹ Nevertheless, a *Bivens* liberty-property deprivation action against federal officials and employees in their personal capacities would probably be precluded.¹⁹²

3. *Claims Against State and Local Government Entities and Officials*

With respect to federal constitutional claims against States, the United States Supreme Court held in 1989 that Congress did not intend that States could be sued as “persons” under § 1983.¹⁹³ Suits against States under the Federal Just Compensation Clause for harm resulting from wrongful convictions, however, are available under the Fifth Amendment’s self-executing Just Compensation Clause.¹⁹⁴

With respect to federal constitutional claims against local governments such as cities and counties, 42 U.S.C. § 1983 provides that relief may be sought for deprivation of federal rights by defendants

189. *Id.* at 2601 (distinguishing circumstances where First Amendment speech rights, Fifth Amendment privilege against self-incrimination, or Sixth Amendment right to trial by jury are involved).

190. See 28 U.S.C. §§ 1495, 2513 (2000).

191. See, e.g., Laufer, *supra* note 5, at 387 (“[T]he federal compensation statute allows for the recovery of a very small award of damages. Even so, meeting the statutory requirements for recovery is difficult, indeed, and few petitioners are successful.”); Lopez, *supra* note 57, at 672–73 (pointing out that requirements that claimant prove he is not guilty or has been pardoned, and that he did not commit the offense charged, as well as the \$5,000 cap on recovery, make the statute practically useless); see also 42 U.S.C. § 1997e(e) (2000) (codifying the Prison Litigation Reform Act of 1996 and restricting ability of prisoners to proceed *in forma pauperis* in federal courts and curtailing their right to claim damages for psychological injury without accompanying physical injury); Robertson, *supra* note 90, at 24 (arguing that the Prison Litigation Reform Act of 1996 unconstitutionally deprives prisoners of Equal Protection).

192. Cf. *Wilkie*, 127 S. Ct. at 2590.

193. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 63 (1989).

194. *Jacobs v. United States*, 290 U.S. 13, 16 (1933) (“[T]he right to just compensation” was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because the duty to pay imposed by the [Fifth A]mendment.”); *Manning v. N.M. Energy, Minerals & Natural Res. Dep’t*, 144 P.3d 87, 96 (N.M. 2006) (authorizing direct action against the State under federal Constitution). See generally Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 601–02 (2006) (“Indeed, text, structure, and, I would argue, history suggest that the Takings Clause should trump state sovereign immunity.”)

implementing governmental custom or policy under color of state law.¹⁹⁵ Actions under the self-executing Federal Just Compensation Clause would be available against local government entities as well.¹⁹⁶ Just compensation claims against states and local governments under *state* constitutions for harm caused by wrongful convictions also may be brought if state precedent establishes the availability of such claims as a matter of state constitutional law.¹⁹⁷

With respect to suits against state and local officials or employees in their individual, personal capacities, federal constitutional claims implied as direct actions from the constitution under *Bivens* clearly are not available because an action can be brought under 42 U.S.C. § 1983.¹⁹⁸ Accordingly, any claim against state or local government officials or employees in their personal capacities based on wrongful convictions would have to be brought under that section.

State constitutional claims implied as direct actions from state constitutions against State or local government officials in their personal capacities, analogous to *Bivens* actions under the federal constitution, have met a mixed response among state supreme courts.¹⁹⁹ No state supreme court decision has addressed whether wrongful convictions can be remedied as set forth in this Article.

In contrast to federal constitutional claims, the state action requirement for purposes of *state* constitutional claims may allow such claims to be brought against otherwise purely private actors even though the connection between the government and the defendants would not meet federal state action requirements. State courts differ on whether the state action requirement applies to claims asserted under state constitutions.²⁰⁰

195. 42 U.S.C. § 1983 (2000) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.").

196. *Chicago, B. & Q. R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897) (holding that the Fifth Amendment's Just Compensation Clause is self-executing and applies to city through Fourteenth Amendment's Due Process Clause).

197. *See, e.g., Heughs Land, L.L.C. v. Holladay City*, 113 P.3d 1024 (Utah 2005); *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990).

198. *Davis v. Passman*, 442 U.S. 228, 248 (1979); *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

199. For an excellent discussion of such claims, see JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES* ch. 7 (4th ed. 2006) (discussing civil actions to enforce state constitutional rights). *See generally* Schwartz, *supra* note 181, at 657.

200. *See, e.g., United Food & Commercial Workers Union, Local 919 v. Crystal Mall Ass'n*, 852 A.2d 659, 671 n.21 (Conn. 2004) (discussing state action requirement for purposes of state constitutional claims); *Price v. U-Haul Co. of La.*, 745 So. 2d 593, 664–73 (La. 1999) (adopting flexible

4. *Personal Liability Defenses*

As a practical matter, defendants acting in their personal capacities are unlikely to have the deep pockets required for a substantial claim of compensation. Claims for wrongful conviction against federal, state or local government officials or employees in their personal capacities are unlikely to be successful. Legally, federal constitutional claims are not available for claims against federal defendants where such defendants act personally, outside their authority, thus negating the state action requirement.²⁰¹ Further, in order to assert a claim against a federal defendant personally under the Federal Constitution, a claimant must demonstrate the defendant acted beyond the scope of employment, in his or her personal capacity. In addition to that requirement, a *prima facie* case against a state or local government defendant in his or her personal capacity must demonstrate that the defendant acted “under color of state law.”²⁰²

In addition, for purposes of absolute immunity and qualified immunity defenses, the United States Supreme Court appears to treat § 1983 actions against defendants personally acting under color of state law and *Bivens* actions against defendants personally acting under color of federal law the same.²⁰³ Absolute immunity is available to judges, prosecutors and parole-board members.²⁰⁴ Qualified immunity shields government officials from personal liability for civil damages as long as their conduct is “objectively reasonable.”²⁰⁵ The objective reasonableness

approach to determining whether state action is present for purposes of state constitutional claims); *Batchelder v. Allied Stores Intern., Inc.*, 445 N.E.2d 590, 593–94 (Mass. 1983) (holding that state action requirement does not apply to state constitutional claim); see also Martin Margulies, *A Terrible Beauty: Functional State Action Analysis and State Constitutions* 9 WHITTIER L. REV. 723, 725–26 (1988). But see *Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n*, 29 P.3d 797, 797 (Cal. 2001) (holding that state action requirement applies under state constitution); *Weaver v. AIDS Servs. of Austin, Inc.*, 835 S.W.2d 798, 802 n.4 (Tex. Ct. App. 1992) (holding that state standard for determining state action for purposes of state constitutional claims does not differ substantially from federal standard for purposes of federal constitutional claims); *Jacobs v. Major*, 407 N.W.2d 832, 841 (Wis. 1987) (holding that there is a presumption that state constitutional claims can only be asserted against defendants whose conduct amounts to “state action”).

201. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 938 (1982).

202. 42 U.S.C. § 1983 (2000). See generally Gary S. Gildin, *The Standard of Culpability in Section 1983 and Bivens Actions: The Prima Facie Case, Qualified Immunity and the Constitution*, 11 HOFSTRA L. REV. 557, 560 (1983).

203. See *Malley v. Briggs*, 475 U.S. 335, 340 n.2 (1986); *Butz v. Economou*, 438 U.S. 478, 504 (1978). See generally Margaret Z. Johns, *A Black Robe Is Not a Big Tent: The Improper Expansion of Absolute Judicial Immunity to Non-Judges in Civil-Rights Cases*, 59 SMU L. REV. 265, 269 n.23 (2006) (agreeing with this assessment).

204. See generally 4 SANDS, LIBONATI & MARTINEZ, *LOCAL GOVERNMENT LAW*, *supra* note 40, at § 27:11 (absolute immunity for judicial and legislative functions: state or federal claims against entities or individuals); Johns, *supra* note 203, at 265.

205. *Crawford-El v. Britton*, 523 U.S. 574, 590, (1998); *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). See generally 4 SANDS, LIBONATI & MARTINEZ, *LOCAL GOVERNMENT LAW*, *supra* note 40, § 27:11.50 (qualified immunity from § 1983 claims against individuals); Gildin, *supra* note 202, at 557.

standard is measured by whether the conduct in question violates the plaintiff's "clearly established" statutory or constitutional rights about which a reasonable person in the position of the defendant official would have known.²⁰⁶

Qualified immunity thus would be available where either (a) a wrongful conviction was not a constitutional violation; or (b) where the constitutional violation was not "clearly established" at the time that a case is first brought.²⁰⁷ With regard to the first scenario, this Article argues that such a constitutional right exists. With regard to the second, it will take adjudication of the first question, at least through a federal circuit court decision and perhaps even up to the United States Supreme Court, to "clearly establish" the right exists.²⁰⁸

In summary, recovery for wrongful convictions against governmental officials and employees in their personal capacities is problematic at best.

5. Governmental Entity Defenses

In *Hurtado v. United States*,²⁰⁹ the United States Supreme Court considered whether Mexican immigrant workers imprisoned as material witnesses in the trials of those who had illegally brought them into the country were entitled to compensation under the Federal Just Compensation Clause. The Court held that "the Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed."²¹⁰ The Court quoted Wigmore on Evidence:

"(I)t may be a sacrifice of time and labor, and thus of ease, of profits, of livelihood. This contribution is not to be regarded as a gratuity, or a courtesy, or an ill-required favor. It is a duty not to be grudged or evaded. Whoever is impelled to evade or to resent it should retire from the society of organized and civilized communities, and become a hermit. He who will live by society must let society live by him, when it requires to."²¹¹

The "public duty" rule announced in *Hurtado* is circular: no compensation is required for the deprivation of liberty because the

206. See, e.g., *Wilson v. Layne*, 526 U.S. 603 (1999) (holding that a media's "ride-along" entry into a home violates the Fourth Amendment, but because the state of the law was not "clearly established" at the time the entry in this case took place, respondent officers are entitled to qualified immunity).

207. *Scott v. Harris*, 127 S. Ct. 1769, 1774 (2007) (discussing two-step inquiry).

208. See, e.g., *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 516 (10th Cir. 1998) (holding that Tenth Circuit or Supreme Court decision establishing the right sought to be enforced is required); *Cope v. Heltsley*, 128 F.3d 452, 460 (6th Cir. 1997) (holding Supreme Court or circuit court decision is required); *Woodward v. City of Worland*, 977 F.2d 1392 (10th Cir. 1992) (holding sexual harassment as equal protection violation not "clearly established" until 1989 and "clearly established" requires federal circuit court decision); *Bates v. Bigger*, 192 F. Supp. 2d 160, 170-71 (S.D.N.Y. 2002) (examining whether circuit court decisions had established right).

209. 410 U.S. 578, 578-91 (1973).

210. *Id.* at 588. For a discussion of the public duty rule, see Master, *supra* note 91, at 124-27 (reviewing road construction, military draft, jury service and material witnesses settings).

211. *Hurtado*, 410 U.S. at 588-89 n.10 (quoting 8 J. WIGMORE, EVIDENCE § 2192, at 72 (1961)).

government already owned the individual's public duty to be deprived of liberty. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, a county, under the authority of a state statute, kept the interest on an interpleader fund deposited in the registry of the county court, even though under another state statute, the county also charged for the clerk's services in holding the fund in the county registry.²¹² The Court held that "a State, by *ipse dixit*, may not transform private property into public property without compensation."²¹³

Similarly, the public duty rule in *Hurtado* would allow the government, by *ipse dixit*, to transform individual liberty into public obligation. If it could do so at all,²¹⁴ it most certainly cannot do so without compensation. Principled identification of circumstances in which liberty deprivations should not trigger the governmental obligation to provide just compensation requires more than the cavalier "love it or leave it" attitude evident in *Hurtado*.

Other governmental defenses are less problematic. In the land use setting, the United States Supreme Court has formulated three possible governmental defenses against the obligation to pay just compensation. The government has the burden of proof with respect to each of these defenses.²¹⁵ Similarly, the government should have the burden of proof in regard to each of these defenses in the "liberty-property" setting.

First, the law of nuisance may provide that under the circumstances, in light of the degree of harm to public lands and resources or adjacent private property posed by the claimant's proposed activities, the social value of the claimant's activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, compensation is not due.²¹⁶ Analogously, where a wrongfully convicted claimant caused the wrongful conviction to occur through his or her own conduct, compensation should not be forthcoming. Thus, the government could avoid liability by showing its procedurally "wrongful" conduct was induced by the claimant. For example, this might occur where a claimant invites criminal prosecution to shield someone else, then seeks compensation because the conviction was wrongful. Or, in the case of substantive governmental

212. 449 U.S. 155, 155-65 (1980).

213. *Id.* at 162.

214. For example, it is beyond debate that the government could not force boys to serve as altar boys in Catholic churches, even if the government promised to pay just compensation.

215. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 395 (1994) ("[T]he city has not met its burden of demonstrating [that exaction was roughly proportional to impact of developer's project on public infrastructure]."); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031-32 (1992) ("South Carolina must identify background principles of nuisance and property law that prohibit the uses [Mr. Lucas] now intends in the circumstances . . .").

216. See *Lucas*, 505 U.S. at 1031.

“wrongful” conduct, the government could avoid liability by showing the claimant indeed committed the offense charged. Unlike the criminal setting, however, the government’s burden of proof would be the civil “preponderance of the evidence” standard.²¹⁷ Unlike under prevalent statutory wrongful conviction remedies, it would not be up to the wrongful conviction claimant to prove factual innocence. However, the government’s burden would be lessened.

Second, in the land use setting, background principles of property law may otherwise limit the nature and extent of the property rights held by the owner under the circumstances. For example, if under state property law marshlands come burdened with a public trust, and if an owner’s proposed development project would be contrary to the public trust, then the owner would have no grounds on which to complain.²¹⁸ It is unlikely that analogous “background principles” of state liberty law would authorize wrongful convictions.

Third, in the land use setting, circumstances of actual necessity, such as demolishing a house to prevent the spreading of a fire, will also absolve the government from liability.²¹⁹ This emergency exception may

217. *See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993) (“The burden of showing something by a ‘preponderance of the evidence,’ the most common standard in the civil law, ‘simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact’s existence.’” (citations omitted)).

218. *See Lucas*, 505 U.S. at 1029. (“Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”). *See generally* 3 SANDS, LIBONATI & MARTINEZ, *LOCAL GOVERNMENT LAW*, *supra* note 4, § 16.53.30 n.18 (illustrating “background principles” defense).

219. *Lucas*, 505 U.S. at 1029 n.16. (“The principal ‘otherwise’ that we have in mind is litigation absolving the State (or private entities) of liability for the destruction of ‘real and personal property, in cases of actual necessity, to prevent the spreading of a fire’ or to forestall other grave threats to the lives and property of others.”). The court in *Lucas* cites two illustrations of the “emergency/actual necessity” defense. In *Bowditch v. Boston*, 101 U.S. 16 (1879), the Court upheld a Boston ordinance which authorized the city fire department to blow up a house in the path of a fire in order to stop the spread of a fire, based on the common law principle of “natural law” or “imperative necessity.” In *United States v. Pacific R.R.*, 120 U.S. 227 (1887), the Court discussed at length the principle that private harm resulting from the Civil War was not compensable. *See also YMCA v. United States*, 395 U.S. 85, 89 (1969) (holding damage caused to a building when federal officers who were seeking to protect the building were attacked by rioters as not a taking).

These cases tend to preclude compensation when the public need is the greatest and the impact on the property owner is absolute destruction. Principles limiting the government’s avoidance of an obligation to compensate the owner have proved elusive. *Compare* *Customer Co. v. City of Sacramento*, 895 P.2d 900 (Cal. 1995) (denying recovery to owner whose store was damaged by police looking for a criminal suspect, on grounds that benefit was conferred and that emergency existed), *with* *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38 (Minn. 1991) (entitling owner in similar circumstances to compensation). The “emergency/actual necessity” defense may be related to the principle that “highly regulated industries” do not have the same level of protected expectations as non-highly regulated industries. For example, in *Fed. Comm’n Comm’n v. Fla. Power Corp.*, 480 U.S. 245, 247 (1987), the Court held that power companies had to allow cable television companies to

encompass several types of wrongful conviction settings. For example, Selective Service laws enforcing a mandatory draft during wartime would not require just compensation.²²⁰ Post-9/11 Homeland Security detentions also might qualify as emergencies for which no compensation is required.²²¹

CONCLUSION

Our system of criminal justice will inevitably result in wrongful convictions. Under present law, little compensation is available to those who suffer harm as a result of such wrongful convictions, and the compensation that exists is often insufficient. This Article demonstrates that wrongful convictions arise at the boundary of liberty and property, and that a reconceptualization of property in relational terms leads to a reconstructed just compensation jurisprudence that compels the provision of compensation for those wrongfully convicted.

string their cables on power company telephone poles for a (nominal) rate set by the FCC because the power companies were a “highly regulated” industry. Similarly, in *Mitchell Arms, Inc. v. United States*, 7 F.3d 212, (Fed. Cir. 1993), the court held that contracts for assault rifles entered into in reliance on import permits did not give rise to protectible investment-backed expectations because of the highly regulated character of the arms industry. *See id.* at 217. The scope of the “highly regulated industries” principle is difficult to cabin: Is the development of land into subdivisions a “highly regulated” industry? In today’s welfare state, is every commercial activity of significance “highly regulated” for this purpose? *See generally* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 7.07[3] (4th ed. 2006) (discussing state court decisions both ways in these types of scenarios); 3 SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 4, § 16.53.40 n.44 (illustrating emergency/actual necessity defense).

220. *See* *United States v. Hobbs*, 450 F.2d 935, 936 (10th Cir. 1971) (upholding mandatory draft).

221. *See generally* Ackerman, *supra* note 2, at 1063–66 (dealing with question of compensation for persons wrongfully detained in the war on terrorism mentioned in passing and noting that there is very little scholarship on the point); Scott J. Borrowman, Comment, *Sosa v. Alvarez-Machain and Abu Ghraib—Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors*, 2005 B.Y.U. L. REV. 371, 372 (arguing victims of Abu Ghraib prisoner abuse scandal should be provided with civil relief).

APPENDIX: COMPILATION OF WRONGFUL CONVICTION STATUTES AND THEIR REQUIREMENTS²²²

Twenty-one states have adopted wrongful conviction statutes to date:

STATE	STATUTORY DEFINITION OF "WRONGFUL CONVICTION"	PROCEDURAL LIMITATIONS	REMEDIAL LIMITATIONS
<i>Alabama</i> ALA. CODE §§ 29-2-156 to -159 (2006)	(1) Have been convicted by the state of one or more felony offenses, all of which the person was innocent, and have served time in prison as a result of the conviction or convictions; or (2) Have been incarcerated pretrial on a state felony charge, for at least two years through no fault of his or her own, before having charges dismissed based on innocence.	For purposes of determination of eligibility for compensation for wrongful incarceration, innocence shall be evidenced by at least one of the following: (1) The conviction vacated or reversed and the accusatory instrument dismissed on grounds of innocence; or (2) The accusatory instrument dismissed on a ground consistent with innocence.	An award is limited to \$50,000 for each year incarcerated (and pro rata for any portion of a year served).
<i>California</i> CAL. PENAL CODE §§ 4900-4906 (Deering 2007)	Having been convicted of any crime against the state amounting to a felony and imprisoned in the state prison for that conviction, is granted a pardon by the Governor for the reason that the crime with which he or she was charged was either not committed at all or, if committed, was not committed by him or her, or who, being	A claim must be presented to the California Victim's Compensation Board within six months of judgment of acquittal, discharge, or pardon; and at least 4 months prior to the next meeting of the legislature. There is a hearing on the claim. Board recommends to the legislature that	An award is limited to \$100/day of incarceration served subsequent to conviction.

222. I would like to thank Mr. Jared Hoskins, S.J. Quinney College of Law at the University of Utah, Class of 2008, for his help in the preparation of this Appendix.

STATE	STATUTORY DEFINITION OF "WRONGFUL CONVICTION"	PROCEDURAL LIMITATIONS	REMEDIAL LIMITATIONS
<i>California</i> (continued)	innocent of the crime with which he or she was charged for either of the foregoing reasons, shall have served the term or any part thereof for which he or she was imprisoned.	there be an appropriation made to the victim.	
<i>District of Columbia</i> D.C. CODE §§ 2-421 to -423 (2006)	<p>Any person unjustly convicted of and subsequently imprisoned for a criminal offense contained in the District of Columbia.</p> <p>Any person bringing suit under § 2-421 must allege and prove:</p> <p>(1) That his conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction; and</p> <p>(2) That, based upon clear and convincing evidence, he did not commit any of the acts charged or his acts or omissions in connection with such charge constituted no offense against the United States or the District of Columbia the maximum penalty for which would equal or exceed the imprisonment served and he did not, by his misconduct, cause or bring about his own prosecution.</p>		<p>Upon a finding by the judge of unjust imprisonment in accordance with the standards set by § 2-422 the judge may award damages.</p> <p>Punitive damages may not be awarded.</p>

STATE	STATUTORY DEFINITION OF "WRONGFUL CONVICTION"	PROCEDURAL LIMITATIONS	REMEDIAL LIMITATIONS
<i>Illinois</i> 705 ILL. COMP. STAT. 505/8 (2006)	Time unjustly served in prisons of this State where the persons imprisoned shall receive a pardon from the governor stating that such pardon is issued on the ground of innocence of the crime for which they were imprisoned.		The court shall make no award in excess of the following amounts: for imprisonment of five years or less, not more than \$15,000; for imprisonment of fourteen years or less but over five years, not more than \$30,000; for imprisonment of over fourteen years, not more than \$35,000; and provided further, the court shall fix attorney's fees not to exceed 25% of the award granted.
<i>Iowa</i> IOWA CODE § 663A.1 (2006)	<p>(a) The individual was charged, by indictment or information, with the commission of a public offense classified as an aggravated misdemeanor or felony.</p> <p>(b) The individual did not plead guilty to the public offense charged, or to any lesser included offense, but was convicted by the court or by a jury of an offense classified as an aggravated misdemeanor or felony.</p> <p>(c) The individual was sentenced to incarceration for a term of imprisonment not to exceed two years if the offense was an aggravated misdemeanor or to an indeterminate term of years under chapter 902 if the offense was a felony, as a result of the conviction.</p>	<p>Upon receipt of an order vacating, dismissing, or reversing the conviction and sentence in a case for which no further proceedings can be or will be held against an individual on any facts and circumstances alleged in the proceedings which resulted in the conviction, the district court shall make a determination whether there is clear and convincing evidence to establish either of the following findings:</p> <p>(a) That the offense for which the individual was convicted, sentenced, and imprisoned, including any lesser-included offenses, was not committed by the individual.</p>	<p>Damages recoverable from the state by a wrongfully imprisoned person under this section are limited to the following:</p> <p>(a) The amount of restitution for any fine, surcharge, other penalty, or court costs imposed and paid and any reasonable attorney's fees and expenses incurred in connection with all criminal proceedings and appeals regarding the wrongfully imposed judgment and sentence and such fees and expenses incurred in connection with any civil actions and proceedings for postconviction relief which are related to</p>

STATE	STATUTORY DEFINITION OF "WRONGFUL CONVICTION"	PROCEDURAL LIMITATIONS	REMEDIAL LIMITATIONS
<i>Iowa (continued)</i>	<p>(d) The individual's conviction was vacated or dismissed, or was reversed, and no further proceedings can be or will be held against the individual on any facts and circumstances alleged in the proceedings which had resulted in the conviction.</p> <p>(e) The individual was imprisoned solely on the basis of the conviction that was vacated, dismissed, or reversed and on which no further proceedings can be or will be had.</p>	<p>(b) That the offense for which the individual was convicted, sentenced, and imprisoned was not committed by any person, including the individual.</p> <p>If the district court finds that there is clear and convincing evidence to support either of the findings set out above, the district court shall do all of the following:</p> <p>(a) Enter an order finding that the individual is a wrongfully imprisoned person.</p> <p>(b) Orally inform the person and the person's attorney that the person has a right to commence a civil action against the state under chapter 669 on the basis of wrongful imprisonment.</p> <p>(c) Within seven days of entry of the order finding that an individual is a wrongfully imprisoned person, the clerk of court shall forward a copy of the order, together with a copy of this section, to the individual named in the order.</p>	<p>the wrongfully imposed judgment and sentence.</p> <p>(b) An amount of liquidated damages in an amount equal to fifty dollars per day of wrongful imprisonment.</p> <p>(c) The value of any lost wages, salary, or other earned income which directly resulted from the individual's conviction and imprisonment, up to twenty-five thousand dollars per year.</p> <p>(d) The value of reasonable attorney's fees for services provided in connection with an action under this section.</p> <p>The state appeal board or the court shall not offset the award by any expenses incurred by the state or any political subdivision of the state in connection with the arrest, prosecution, and imprisonment of the individual, including, but not limited to, expenses for food, clothing, shelter, and medical care.</p> <p>Actions shall be commenced within two years of entry of the district court</p>

STATE	STATUTORY DEFINITION OF "WRONGFUL CONVICTION"	PROCEDURAL LIMITATIONS	REMEDIAL LIMITATIONS
<i>Iowa (continued)</i>			order adjudging the individual to be a wrongfully imprisoned person.
<p><i>Maine</i> ME. REV. STAT. ANN. tit. 14, § 8241 (2006)</p>	<p>(A) That the person was convicted of a criminal offense under the laws of this State;</p> <p>(B) That as a result of that conviction, the person was sentenced to a period of incarceration and was actually incarcerated;</p> <p>(C) That subsequent to the conviction and as a condition precedent to suit, the person received a full and free pardon pursuant to the Constitution of Maine, Article V, Part First, Section 11, which is accompanied by a written finding by the Governor who grants the pardon that the person is innocent of the crime for which that person was convicted; and</p> <p>(D) That the court finds that the person is innocent of the crime for which the person was convicted.</p>	<p>A Governor's failure to issue a written finding that the person is innocent of the crime for which the person was convicted is final and not subject to judicial view.</p> <p>Every claim for wrongful imprisonment permitted under this chapter is forever barred from the courts of this State unless an action is begun in the courts within two years after the date of the full and free pardon of the conviction on which the claim is based.</p>	<p>In any action for damages permitted by this chapter, the claim for and award of damages, including costs, against the State may not exceed \$300,000 for all claims arising as a result of a single conviction.</p> <p>A judgment or award against the State pursuant to this chapter may not include punitive or exemplary damages.</p>
<p><i>Maryland</i> MD. CODE ANN., STATE FIN. & PROC. § 10-501 (West 2006)</p>	<p>An individual erroneously convicted, sentenced, and confined under State law for a crime the individual did not commit.</p> <p>The individual must have received from the Governor a full pardon stating that the individual's conviction has been shown conclusively to be in error.</p>		<p>If an individual uses any part of a grant received under the statute to pay for services rendered to collect the grant, that part of the grant is forfeited to the State.</p>

STATE	STATUTORY DEFINITION OF "WRONGFUL CONVICTION"	PROCEDURAL LIMITATIONS	REMEDIAL LIMITATIONS
<p><i>Massachusetts</i> MASS. GEN. LAWS ch. 258D, §§ 1-9 (2006)</p>	<p>Those that have been granted a full pardon pursuant to section 152 of chapter 127, if the governor expressly states in writing his belief in the individual's innocence, or those who have been granted judicial relief by a state court of competent jurisdiction, on grounds which tend to establish the innocence of the individual as set forth in clause (vi) of subsection (C), and if:</p> <p>(a) The judicial relief vacates or reverses the judgment of a felony conviction, and the felony indictment or complaint used to charge the individual with such felony has been dismissed, or if a new trial was ordered, the individual was not retried and the felony indictment or complaint was dismissed or a <i>nolle prosequi</i> was entered, or if a new trial was ordered the individual was found not guilty at the new trial; and</p> <p>(b) At the time of the filing of an action under this chapter no criminal proceeding is pending or can be brought against the individual by a district attorney or the attorney general for any act associated with such felony conviction.</p>		<p>Maximum of \$500,000, as well as the potential for physical and emotional services, educational services at any state or community college, and expungement of the record of conviction.</p>
<p><i>Missouri</i> MO. REV. STAT. § 650.058 (2006)</p>	<p>Any individual who was found guilty of a felony in a Missouri court and later determined to be actually innocent of such crime solely as a result of DNA profiling analysis.</p>		<p>Eligible for \$50 per day of post-conviction confinement if filed within one year of release.</p>

STATE	STATUTORY DEFINITION OF "WRONGFUL CONVICTION"	PROCEDURAL LIMITATIONS	REMEDIAL LIMITATIONS
<i>Montana</i> MONT. CODE ANN. § 53-1-214 (2006)	Person whose judgment of conviction was overturned by a court based on the results of postconviction forensic DNA testing that exonerates the person of the crime for which the person was convicted.		Provides educational aid to wrongfully convicted persons exonerated through post-conviction DNA testing.
<i>New Hampshire</i> N.H. REV. STAT. ANN. §§ 541-B:9 to :14 (2006)	Time unjustly served in the state prison when a person is found to be innocent of the crime for which he was convicted.		Such a claim shall be limited to an award not to exceed \$20,000.
<i>New Jersey</i> N.J. STAT. ANN. § 52: 4C-1 (West 2006)	<p>Innocent persons who have been convicted of crimes and subsequently imprisoned, who can demonstrate by clear and convincing evidence that they were mistakenly convicted and imprisoned.</p> <p>The person (hereinafter titled, "the claimant") shall establish the following by clear and convincing evidence:</p> <p>(a) That he was convicted of a crime and subsequently sentenced to a term of imprisonment, served all or any part of his sentence; and</p> <p>(b) He did not commit the crime for which he was convicted; and</p> <p>(c) He did not by his own conduct cause or bring about his conviction.</p>	<p>The court, in exercising its discretion as permitted by law regarding the weight and admissibility of evidence submitted pursuant to this section, may, in the interest of justice, give due consideration to difficulties of proof caused by the passage of time, the death or unavailability of witnesses, the destruction of evidence or other factors not caused by such persons or those acting on their behalf.</p> <p>The suit, accompanied by a statement of the facts concerning the claim for damages, verified in the manner provided for the verification of complaints in civil actions, shall be brought by the claimant within a period of two years after his release from imprisonment, or after the grant of a</p>	<p>Damages awarded under this act shall not exceed twice the amount of the claimant's income in the year prior to his incarceration or \$20,000.00 for each year of incarceration, whichever is greater.</p> <p>In addition to the damages awarded pursuant to subsection a., the claimant shall be entitled to receive reasonable attorney fees.</p> <p>A person serving a term of imprisonment for a crime other than a crime of which the person was mistakenly convicted shall not be eligible to file a claim for damages pursuant to the provisions of this act.</p> <p>A person shall not be eligible to file a claim for damages</p>

STATE	STATUTORY DEFINITION OF "WRONGFUL CONVICTION"	PROCEDURAL LIMITATIONS	REMEDIAL LIMITATIONS
<i>New Jersey</i> (continued)		pardon to him.	pursuant to the provisions of this act if the sentence for the crime of which the person was mistakenly convicted was served concurrently with the sentence for the conviction of another crime.
<i>New York</i> N.Y. C.P.L.R. 8-b (McKinney 2006)	<p>Innocent persons who have been wrongly convicted of crimes and subsequently imprisoned.</p> <p>Those innocent persons who can demonstrate by clear and convincing evidence that they were unjustly convicted and imprisoned.</p> <p>Any person convicted and subsequently imprisoned for one or more felonies or misdemeanors against the state which he did not commit may, under the conditions hereinafter provided, present a claim for damages against the state.</p>	<p>The court, in exercising its discretion as permitted by law regarding the weight and admissibility of evidence submitted pursuant to this section, shall, in the interest of justice, give due consideration to difficulties of proof caused by the passage of time, the death or unavailability of witnesses, the destruction of evidence or other factors not caused by such persons or those acting on their behalf.</p> <p>In order to obtain a judgment in his favor, claimant must prove by clear and convincing evidence that:</p> <p>(a) He has been convicted of one or more felonies or misdemeanors against the state and subsequently sentenced to a term of imprisonment, and has served all or any part of the sentence; and</p>	Damages in such sum of money as the court determines will fairly and reasonably compensate him.

STATE	STATUTORY DEFINITION OF "WRONGFUL CONVICTION"	PROCEDURAL LIMITATIONS	REMEDIAL LIMITATIONS
<i>New York</i> (continued)		<p>(b) (i) He has been pardoned upon the ground of innocence of the crime or crimes for which he was sentenced and which are the grounds for the complaint; or (ii) His judgment of conviction was reversed or vacated, and the accusatory instrument dismissed or, if a new trial was ordered, either he was found not guilty at the new trial or he was not retried and the accusatory instrument dismissed; provided that the judgment of conviction was reversed or vacated, and the accusatory instrument was dismissed and;</p> <p>(c) He did not commit any of the acts charged in the accusatory instrument or his acts or omissions charged in the accusatory instrument did not constitute a felony or misdemeanor against the state; and</p> <p>(d) He did not by his own conduct cause or bring about his conviction.</p>	
<i>North Carolina</i> N.C. GEN. STAT. § 148-82 (2006)	Any person who, having been convicted of a felony and having been imprisoned in a State prison, who was thereafter or who shall hereafter be granted a pardon of innocence by the Governor upon the	<p>The petition must presented within five years of the granting of the pardon.</p> <p>Such petition shall be addressed to the Industrial Commission.</p>	The Industrial Commission shall award to the claimant an amount equal to \$20,000 for each year or the pro rata amount for the portion of each year of the imprisonment

STATE	STATUTORY DEFINITION OF "WRONGFUL CONVICTION"	PROCEDURAL LIMITATIONS	REMEDIAL LIMITATIONS
<i>North Carolina (continued)</i>	grounds that the crime with which the person was charged either was not committed at all or was not committed by that person.		actually served, including any time spent awaiting trial, but in no event shall the compensation exceed a total amount of \$500,000.
<i>Ohio</i> OHIO REV. CODE ANN. § 2743.48 (West 2006)	<p>(a) The individual was charged with a violation of a section of the Revised Code by an indictment or information prior to, or on or after, September 24, 1986, and the violation charged was an aggravated felony or felony.</p> <p>(b) The individual was found guilty of, but did not plead guilty to, the particular charge or a lesser-included offense by the court or jury involved, and the offense of which the individual was found guilty was an aggravated felony or felony.</p> <p>(c) The individual was sentenced to an indefinite or definite term of imprisonment in a state correctional institution for the offense of which the individual was found guilty.</p> <p>(d) The individual's conviction was vacated or was dismissed, or reversed on appeal, the prosecuting attorney in the case cannot or will not seek any further appeal of right or upon leave of court, and no criminal proceeding is pending, can be brought, or will be brought by any prosecuting attorney, city</p>	<p>The complainant may establish that the claimant is a wrongfully imprisoned individual by submitting to the court of claims a certified copy of the judgment entry of the court of common pleas associated with the claimant's conviction and sentencing, and a certified copy of the entry of the determination of a court of common pleas that the claimant is a wrongfully imprisoned individual.</p> <p>No other evidence shall be required of the complainant to establish that the claimant is a wrongfully imprisoned individual, and the claimant shall be irrebuttably presumed to be a wrongfully imprisoned individual.</p>	<p>A wrongfully imprisoned individual is entitled to receive a sum of money that equals the total of each of the following amounts:</p> <p>(a) The amount of any fine or court costs imposed and paid, and the reasonable attorney's fees and other expenses incurred by the wrongfully imprisoned individual in connection with all associated criminal proceedings and appeals, and, if applicable, in connection with obtaining the wrongfully imprisoned individual's discharge from confinement in the state correctional institution;</p> <p>(b) For each full year of imprisonment in the state correctional institution for the offense of which the wrongfully imprisoned individual was found guilty, forty</p>

STATE	STATUTORY DEFINITION OF "WRONGFUL CONVICTION"	PROCEDURAL LIMITATIONS	REMEDIAL LIMITATIONS
<i>Ohio (continued)</i>	<p>director of law, village solicitor, or other chief legal officer of a municipal corporation against the individual for any act associated with that conviction.</p> <p>(e) Subsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in the individual's release, or it was determined by a court of common pleas that the offense of which the individual was found guilty, including all lesser-included offenses, either was not committed by the individual or was not committed by any person.</p>		<p>thousand three hundred thirty dollars or the adjusted amount determined by the auditor of state pursuant to section 2743.49 of the Revised Code, split and for each part of a year of being so imprisoned, a prorated share of forty thousand three hundred thirty dollars or the adjusted amount determined by the auditor of state pursuant to section 2743.49 of the Revised Code;</p> <p>(c) Any loss of wages, salary, or other earned income that directly resulted from the wrongfully imprisoned individual's arrest, prosecution, conviction, and wrongful imprisonment;</p> <p>(d) The amount of the following cost debts the department of rehabilitation and correction recovered from the wrongfully imprisoned individual who was in custody of the department or under the department's supervision:</p> <p>(i) Any user fee or copayment for services at a detention facility,</p>

STATE	STATUTORY DEFINITION OF "WRONGFUL CONVICTION"	PROCEDURAL LIMITATIONS	REMEDIAL LIMITATIONS
<i>Ohio (continued)</i>			<p>including, but not limited to, a fee or copayment for sick call visits;</p> <p>(ii) The cost of housing and feeding the wrongfully imprisoned individual in a detention facility;</p> <p>(iii) The cost of supervision of the wrongfully imprisoned individual;</p> <p>(iv) The cost of any ancillary services provided to the wrongfully imprisoned individual.</p> <p>Reasonable attorney fees incurred in pursuing the statutory claim are also recoverable.</p> <p>Additionally, to be eligible to so recover, the wrongfully imprisoned individual shall commence a civil action under this section in the court of claims no later than two years after the date of the entry of the determination of a court of common pleas that the individual is a wrongfully imprisoned individual.</p>
<i>Oklahoma</i> OKLA. STAT. tit. 51, § 154(B)(1) (2006)	Wrongful criminal felony conviction resulting in imprisonment, the claimant has received a	A claimant shall not be entitled to compensation for any part of a sentence in	<p>Shall not exceed \$175,000.00.</p> <p>No award for</p>

STATE	STATUTORY DEFINITION OF "WRONGFUL CONVICTION"	PROCEDURAL LIMITATIONS	REMEDIAL LIMITATIONS
<i>Oklahoma (continued)</i>	<p>full pardon on the basis of a written finding by the Governor of actual innocence for the crime for which the claimant was sentenced or has been granted judicial relief absolving the claimant of guilt on the basis of actual innocence of the crime for which the claimant was sentenced.</p> <p>For a claimant to recover based on "actual innocence," the individual must meet the following criteria:</p> <p>(a) The individual was charged, by indictment or information, with the commission of a public offense classified as a felony,</p> <p>(b) The individual did not plead guilty to the offense charged, or to any lesser included offense, but was convicted of the offense,</p> <p>(c) The individual was sentenced to incarceration for a term of imprisonment as a result of the conviction,</p> <p>d. the individual was imprisoned solely on the basis of the conviction for the offense, and</p> <p>in the case of a pardon, a determination was made by either the Pardon and Parole Board or the Governor that the offense for which the individual was convicted, sentenced and imprisoned, including any lesser offenses, was not committed by the individual, or in the case</p>	<p>prison during which the claimant was also serving a concurrent sentence for a crime not covered by this subsection.</p> <p>The provisions of this subsection shall apply to convictions occurring on or before the effective date of this act as well as convictions occurring after the effective date of this act. If a court of competent jurisdiction finds that retroactive application of this subsection is unconstitutional, the prospective application of this subsection shall remain valid.</p>	<p>damages in an action or any claim against the state or a political subdivision shall include punitive or exemplary damages.</p>

STATE	STATUTORY DEFINITION OF "WRONGFUL CONVICTION"	PROCEDURAL LIMITATIONS	REMEDIAL LIMITATIONS
<i>Oklahoma</i> (continued)	of judicial relief, a court of competent jurisdiction found by clear and convincing evidence that the offense for which the individual was convicted, sentenced and imprisoned, including any lesser included offenses, was not committed by the individual and issued an order vacating, dismissing or reversing the conviction and sentence and providing that no further proceedings can be or will be held against the individual on any facts and circumstances alleged in the proceedings which had resulted in the conviction.		
<i>Tennessee</i> TENN. CODE ANN. § 9-8-108 (2006)	Persons wrongfully imprisoned and granted exoneration pursuant to § 40-27-109.	Must be filed with the board no later than one (1) year from the date that the claimant is granted exoneration pursuant to § 40-27-109; and the state of Tennessee shall have a right of subrogation as provided by law for any amount awarded pursuant to this subdivision against any person who willfully and intentionally committed an act or engaged in conduct that directly resulted in or contributed to the wrongful conviction and imprisonment of the claimant.	Compensation payable to such persons shall be determined by the board considering all factors the board considers relevant including, but not limited to, the person's physical and mental suffering and loss of earnings; provided, however, that the maximum aggregate total of such compensation shall not exceed \$1,000,000.

STATE	STATUTORY DEFINITION OF "WRONGFUL CONVICTION"	PROCEDURAL LIMITATIONS	REMEDIAL LIMITATIONS
<p><i>Texas</i></p> <p>TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.001-.003, .051-.052, .101- .105, .151-.154 (Vernon 2006)</p>	<p>A person is entitled to compensation if:</p> <p>(1) The person has served in whole or in part a sentence in prison under the laws of this state; and</p> <p>(2) The person:</p> <p>(A) Has received a full pardon on the basis of innocence for the crime for which the person was sentenced; or</p> <p>(B) Has been granted relief on the basis of actual innocence of the crime for which the person was sentenced.</p>	<p>Must seek compensation not later than the third anniversary of the date the person received the pardon or was found not guilty.</p> <p>Must either (1) file an application with the comptroller; or (2) file suit against the state for compensation.</p>	<p>A person is not entitled to compensation for any part of a sentence in prison during which the person was also serving a concurrent sentence for another crime to which the statute does not apply.</p> <p>One is entitled to compensation in an amount equal to:</p> <p>(1) \$25,000 multiplied by the number of years served in prison, expressed as a fraction to reflect partial years, if the time served is less than twenty years; or</p> <p>(2) \$500,000 if the time served is twenty years or more.</p>
<p><i>Virginia</i></p> <p>VA. CODE ANN. § 8.01-195.10 (2006)</p>	<p>Incarceration for a felony conviction for which the conviction has been vacated, the person incarcerated must have entered a final plea of not guilty, or regardless of the plea, any person sentenced to death, or convicted of a Class 1 felony, a Class 2 felony, or any felony for which the maximum penalty is imprisonment for life, and the person incarcerated did not by any act or omission on his part intentionally contribute to his conviction for the felony for which he was incarcerated.</p>		<p>90% of the Virginia per capita personal income for up to twenty years plus a tuition award worth \$10,000 in the VA community college system.</p>

STATE	STATUTORY DEFINITION OF "WRONGFUL CONVICTION"	PROCEDURAL LIMITATIONS	REMEDIAL LIMITATIONS
<p><i>West Virginia</i></p> <p>W. VA. CODE § 14-2-13a (2006)</p>	<p>In order to present the claim for unjust arrest, imprisonment or conviction and imprisonment, claimant must establish by documentary evidence that:</p> <p>(1) He has been convicted of one or more felonies or misdemeanors against the state and subsequently sentenced to a term of imprisonment, and has served all or any part of the sentence; and</p> <p>(2) He has been pardoned upon the ground of innocence of the crime or crimes for which he was sentenced and which are the grounds for the complaint; or</p> <p>(3) His judgment of conviction was reversed or vacated, and the accusatory instrument dismissed or, if a new trial was ordered, either he was found not guilty at the new trial or he was not retried and the accusatory instrument dismissed; or</p> <p>(4) The statute, or application thereof, on which the accusatory instrument was based violated the constitution of the United States or the state of West Virginia</p> <p>The claim shall state facts in sufficient detail to permit the court to find that claimant is likely to succeed at trial in proving that:</p>	<p>Any person claiming compensation under this section based on a pardon that was granted before the effective date of this section or the dismissal of an accusatory instrument that occurred before the effective date of this section shall file his claim within two years after the effective date of this section.</p> <p>Any person claiming compensation under this section based on a pardon that was granted on or after the effective date of this section or the dismissal of an accusatory instrument that occurred on or after the effective date of this section shall file his claim within two years.</p>	

STATE	STATUTORY DEFINITION OF "WRONGFUL CONVICTION"	PROCEDURAL LIMITATIONS	REMEDIAL LIMITATIONS
<i>West Virginia</i> (continued)	<p>(1) In the case of an unjust arrest or imprisonment with a warrant, information or indictment which was subsequently dismissed that another person was arrested or prosecuted and convicted for the same offense or offenses, and</p> <p>(2) In the case of an unjust conviction and imprisonment that he did not commit any of the acts charged in the accusatory instrument or his acts or omissions charged in the accusatory instrument did not constitute a felony or misdemeanor against the state, and</p> <p>(3) He did not by his own conduct cause or bring about his conviction. The claim shall be verified. If the court finds after reading the claim that claimant is not likely to succeed at trial, it shall dismiss the claim, either on its own motion or on the motion of the state.</p>		
<i>Wisconsin</i> WIS. STAT. § 775.05 (2006)	Any person who is imprisoned as the result of his or her conviction for a crime in any court of this state, of which crime the person claims to be innocent, and who is released from imprisonment for that crime after March 13, 1980, may petition the claims board for compensation for such imprisonment.		<p>The claims board shall find the amount which will equitably compensate the petitioner, not to exceed \$25,000 and at a rate of compensation not greater than \$5,000 per year for the imprisonment.</p> <p>Compensation awarded by the claims board shall include any amount to which the board</p>

STATE	STATUTORY DEFINITION OF "WRONGFUL CONVICTION"	PROCEDURAL LIMITATIONS	REMEDIAL LIMITATIONS
<i>Wisconsin (continued)</i>			finds the petitioner is entitled for attorney fees, costs and disbursements. If the claims board finds that the amount it is able to award is not an adequate compensation it shall submit a report specifying an amount which it considers adequate to the chief clerk of each house of the legislature, for distribution to the legislature.